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IN THE

Supreme Court of the United States

October Term, 1994

JOHN W. MARTIN, *et al.*,

Petitioners,

v.

ROBERT K. WILKS, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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February 23, 1995

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QUESTIONS PRESENTED FOR REVIEW

1. Can reverse discrimination plaintiffs rely on the results of unlawful selection criteria to prove job entitlement?
2. Is it unlawful for the rate at which promotional relief is provided to exceed the percentage of minorities in the position from which the promotions are made?
3. Is the achievement of a racially balanced work force an unconstitutional goal as a remedy for egregious discrimination by an employer?
4. When race-conscious remedial relief is justified under Title VII and the Equal Protection Clause, are non-minorities' rights trammelled by a 7-9 month promotional delay?
5. Do the Equal Protection Clause and Title VII require a public employer faced with a compelling interest in implementing affirmative action to limit any such relief in a consent decree to slow, prolonged relief, instead of effective, shorter-lived relief?
6. May a court of appeals disregard the facts found by the district court, which has presided over this and related litigation for 20 years, and construe the record—including the operation of consent decrees entered and supervised by the district court—on a de novo basis?

PARTIES TO THE PROCEEDINGS BELOW

Defendant-Intervenors
(Petitioners here)

John W. Martin
Sam Coar
Major Florence
Charles Howard
Ida McGruder
Eugene Thomas

Defendants

Richard Arrington, Jr.
Roderick Beddow, Jr.
City of Birmingham, Alabama
Joseph W. Curtin
James W. Fields
Patricia Hoban-Moore
Jefferson County Personnel Board
James B. Johnson
Henry P. Johnston
Hiram Y. McKinney

Plaintiffs

James A. Bennett
Birmingham Association of City Employees
Charles E. Carlin
Ronnie J. Chambers
Floyd E. Click
Joel A. Day
Lane L. Denard
John E. Garvich, Jr.
Dudly L. Greenway
James W. Henson
Gerald L. Johnson
Danny R. Laughlin
Robert B. Millsap
James D. Morgan
Gene E. Northington
Carlice E. Payne
Howard E. Pope
Vincent J. Vella
Kenneth O. Ware
Phillip H. Whitley
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Robert K. Wilks
David H. Woodall

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

John W. Martin, *et al.*, respectfully petition for a writ of *certiorari* to review the decision of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported as *In re Birmingham Reverse Discrimination Empl. Litig.*, 20 F.3d 1525 (11th Cir. 1994) (*"BRDEL Appeal II"*) and is reprinted in the Appendix to this petition at A2. The opinions of the United States District Court for the Northern District of Alabama are reported as *Bennett v. Arrington*, 806 F. Supp. 926 (N.D. Ala. 1992); *In re Birmingham Reverse Discrimination Empl. Litig.*,

39 Fair Empl. Prac. Cas. (BNA) 1431 (N.D. Ala. 1985) ("BRDEL"); and *United States v. Jefferson County*, 28 Fair Empl. Prac. Cas. (BNA) 1834 (N.D. Ala. 1981), *aff'd*, 720 F.2d 1511 (11th Cir. 1983) and are reprinted in the Appendix to this petition at A52, A65 and A106.

JURISDICTION

The judgment of the Court of Appeals was entered on May 4, 1994. The Court of Appeals denied petitioners' petition for rehearing on November 25, 1994. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 1254(1) and 2101(c).

STATUTES INVOLVED

The relevant constitutional and statutory provisions are set forth in the Appendix to this petition at A1.

STATEMENT OF THE CASE

1. *The Litigation Leading to the Decree.* This controversy arises from the City of Birmingham's (the "City") infamous and prolonged record of discrimination against blacks in public employment. The positions at issue in this litigation principally concern the Birmingham Fire and Rescue Service (the "BFRS"), which, like the City workforce in general, remained virtually all-white until the 1980s. By law, blacks could not apply for BFRS jobs until the mid-1950s. 1985 DX 1982-84.[1] Given the role of the BFRS in attacking "civil rights protestors . . . [with] firehoses", *Walker v. City of Birmingham*, 388 U.S. 307, 325 n.1 (1967) (Warren, C.J., dissenting), it is hardly surprising that the BFRS did not hire a black until 1968, and filled 147 consecutive vacancies with whites before hiring its second black four years later. 1979 PX 28 at 3; 1979 PX 28 at 5, PX 1 at 121-24. By 1976, only 8 of 437 Firefighters (1.8%) were black. 1979 PX 1 at 117-26. Until the promotions challenged by respondents

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[1] Defendants' Exhibits from the 1979, 1985 and 1991 trials are cited as 19XX DX XX; Plaintiffs' Exhibits are cited as 19XX PX XX and the transcripts from those trials are cited as 19XX Tr. XX. The record is cited as RXX-XX-XX.

occurred in 1982, no black had ever held a supervisory position in the BFRS. 1991 PX 11 at 51.

In January 1974, private plaintiffs filed two lawsuits against the City: *Ensley Branch, NAACP v. Seibels*, No. CA-74-2-12-S (N.D. Ala. filed Jan. 4, 1974), and *Martin v. City of Birmingham*, No. CA-74-Z-17-S (N.D. Ala. filed Jan. 7, 1974). Those cases alleged long-standing, pervasive discrimination against blacks in virtually all aspects of employment and sought injunctive relief and back pay.

On August 30, 1974, the United States advised the City and the Personnel Board of Jefferson County (the "Board") of its finding that the City and Board had "engaged in a pattern and practice of discriminatory employment practices with adverse impact on blacks and females". 1991 DX 84 at 1. The United States found that in City employment "blacks are generally in lower paying unclassified jobs while whites are in the higher paying classified jobs" and that:

> The assignment patterns revealed in these statistics are, according to our information, the results of a policy of hiring blacks for low paying, less desirable jobs, and imposing requirements for assignments or promotions to higher paying jobs which operate to disqualify disproportionate numbers of black applicants, but which have not been shown to be predictive of nor necessary for successful job performance.

Id. at 2.[2] The United States demanded that the City sign a consent decree requiring *inter alia*: "the hiring of blacks and females *on an accelerated basis* in order to overcome the present effects of past discrimination." *Id.* at 4 (emphasis added).

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[2] In 1974, only 175 of the City's 2,417 classified employees, or 4%, were black, 1976 PX 4 at 1-7, while the City's unclassified work force was approximately 75% black. 1985 PX 23 at 3. Unlike classified employees, unclassified employees have "no tenure of employment . . . no upward mobility . . . [and] do not participate in many of the base benefits" afforded to classified employees. 1979 PX 32 at 118.

In May 1975, the United States sued the City, the Board and others, *United States v. Jefferson County*, No. CA-75-P-666-S (N.D. Ala. filed May 27, 1975), alleging systematic discrimination against blacks and women in employment, including hiring and promotion. The United States challenged the use of "qualifications, tests, and other selection standards" for hiring and promotion that had an adverse impact on blacks and women and that had "not been shown to be predictive of successful job performance". *Id.* at 5-6. The United States sought extensive injunctive relief, including procedures and an order requiring the City to hire qualified black and female applicants in sufficient numbers to overcome the effects of past discrimination. *Id.*

After trial in 1976, limited to the issue of entry-level fire and police department testing, the district court found that the entry-level Firefighter and Police Officer tests were unlawful because they had an adverse impact on blacks and were not job-related. *Ensley Branch, NAACP v. Seibels*, 14 Fair Empl. Prac. Cas. (BNA) 670, 685 (N.D. Ala. 1977), *aff'd in pertinent part*, 616 F.2d 812 (5th Cir.), *cert. denied*, 449 U.S. 1061 (1980). In 1979, the district court held a second trial concerning numerous other employment and promotional practices used by the City and the Board. The United States and private plaintiffs presented evidence for a multitude of job classifications, including those in the BFRS and Engineering department, demonstrating that the City and the Board discriminated against blacks and women not only by failing to hire them, but also by failing to promote them once hired. *See, e.g.*, 1979 PX 28 at 4; 1979 Tr. 639-40; 1979 PX 29 at 6-7, PX 70 at 7.[3]

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[3] For example, the 1979 trial evidence established that most of the few black Firefighters in the BFRS were ineligible to take the promotional examination because of lack of seniority, and that the all-white BFRS officers assigned failing promotional potential ratings to blacks (thus preventing them from taking the promotional examination) almost four times more frequently than to whites, a pass/fail differential statistically significant at the .0001 level. 1979 PX 70 at 7.

When the City began settlement negotiations with the United States in 1980, it had been confronted at two trials with extensive evidence of its discrimination. After negotiating for more than a year and considering many alternatives, the parties agreed to settle the litigation by entering into two consent decrees. The consent decree with the City (the "Decree") established long-term goals for blacks and women in all job classifications in the City service and annual hiring or promotional goals for roughly one-fifth of City job classifications. All goals were explicitly made "subject to the availability of qualified applicants." Decree ¶¶ 5-8, 9b, 10b (the Decree is set forth in the Appendix at A118).

On August 3, 1981, after broad public notice, the district court held a fairness hearing at which the United States reaffirmed its judgment that "under Supreme Court decisions and relevant Fifth Circuit law [ ] the provisions of the decree, including the affirmative hiring and promotion of relief, are lawful and proper." 1985 DX 1431 at 40. Several persons filed written objections to the Decree and appeared at the hearing. Among them was the Birmingham Firefighters Association, to which all 14 firefighter respondents belonged, and which was represented by the same counsel who has represented respondents throughout this litigation. R11-23-43; R13-318-3.

On August 21, 1981, the district court entered the City and Board Decrees and issued an opinion explaining its basis for doing so. *Jefferson County*, 28 Fair Empl. Prac. Cas. 1834. The court noted, based upon substantial and wide-ranging evidence demonstrating discrimination by the Board and the City against blacks and women:

> it can hardly be doubted that there is more than ample reason for the Personnel Board and the City of Birmingham to be concerned that they would be in time held liable for discrimination against blacks at higher level positions in the police and fire departments and for discrimination against women at all levels in those departments.

Id. at 1838. The court concluded that "[t]he settlement represents a fair, adequate and reasonable compromise of the

issues between the parties to which it is addressed and is not inequitable, unconstitutional, or otherwise against public policy." *Id.* at 1839. The court found that the absence of blacks and women in promotional positions in City employment was "a natural consequence of discrimination against blacks at entry-level positions." *Id.* at 1838.

2. *Structure and Implementation of the Decree.* For each position in the BFRS, the Decree established a long-term goal of the employment of blacks "in percentages which approximate their respective percentages in the civilian labor force of Jefferson County as defined by the 1970 Federal Census." Decree ¶ 5. This set the long-term goal at 28%. *Id.*[4] To achieve that goal, the Decree set annual percentage promotional goals for roughly one-fifth of all City job classifications. For Fire Lieutenant, the annual goal was set at 50% black. *Id.* at ¶ 6. For Fire Captain (and Battalion Chief), the annual goal was set at "twice the black percentage representation in the job classifications from which promotional candidates are traditionally selected for those jobs." *Id.* at ¶ 8. The Decree did not obligate the City to meet those annual goals, but rather to "attempt to achieve" or "seek to achieve" them. *Id.* at ¶¶ 6, 8. The Decree required that "subject to the availability of qualified black candidates", the City promote blacks to two of the next four Lieutenant vacancies and to one of the next two Captain vacancies. *Id.* The Decree further provided for the termination of the annual percentage goal for a job classification once the long-term goal for that job was achieved or the Decree was modified.[5] *United States v. Jefferson County*, No. CV

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[4] Paragraph 5 of the Decree explicitly permitted the City to alter the long-term goal for any job category in which specialized education or experience was necessary. Decree ¶ 5; *see Ensley Branch, NAACP v. Siebels*, 31 F.3d 1548, 1557 (11th Cir. 1994).

[5] By its terms, any party to the Decree could move to modify it six years or more after its entry. *Id.* at ¶ 55. On May 2, 1990, the United States moved to modify the Decree; thereafter, the district court granted limited intervention to classes of white male, black and female employees and prospective employees. After an evidentiary hearing, the district court

75-P-666-S (N.D. Ala. entered May 21, 1991), reprinted in the Appendix at A166, A177. In fact, the 50% annual goal for Fire Lieutenant terminated in early 1989, when 28% of BFRS Fire Lieutenants were black.

Prior to the Decree, the BFRS did not compare the qualifications of any promotional candidates, but promoted individuals in rank order according to the Board's certification lists, which were based on a combination of test scores and seniority points. *BRDEL*, 39 Fair Empl. Prac. Cas. at 1437 ¶ 16, 1438 ¶ 25. The only material change in BFRS hiring and promotion practices caused by the Decrees was that instead of promoting in rank order from Board certification lists based on test scores and seniority, which historically were composed almost entirely of white male candidates, the BFRS received separate lists from the Board containing eligible black, white and female candidates, from which it selected promotees consistent with its obligation to attempt to meet the Decree's goals. *Id.* at 1437 ¶ 17.

As the district court found, rank-order certification is not related to job performance and has demonstrable adverse impact. *Id.* at 1434 ¶54, 1440 ¶ 59, 1443-44 ¶ 96. Those findings have never been disturbed by an appellate court. Therefore, since entry of the Decree, the City has been hiring and promoting from lists of persons certified by the Board as qualified, without regard to spurious rank-order information. In practice, the City's post-Decree promotion practices have afforded substantial opportunities to white males, though necessarily less than those they enjoyed under the

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modified the Decree in certain respects by orders entered May 21, 1991, and September 25, 1991. Those orders and the accompanying opinions are set forth in the Appendix at A116 and A181. The orders were reviewed by the Eleventh Circuit and affirmed, reversed, vacated and remanded in various parts. *Ensley Branch*, 31 F.3d 1548. The Eleventh Circuit also directed the district court to set deadlines for the development of valid selection procedures and to determine whether the effects of past City and Board discrimination persist to justify continued affirmative action. *Id.* at 1571-79.

discriminatory regime in place prior to Decree's adoption. *See infra* at pp. 23-24. The vast majority of white males have been promoted with little or no delay over what would have happened absent the Decree; the average Decree-based delay of all white males who have taken, passed, and scored well enough on promotional exams in the BFRS to be promoted strictly according to rank order is approximately seven and one-half months. *See infra* at pp. 19-20. In fact, all but one of the 14 firefighter respondents were promoted by 1988. 1991 DX 1-2.[6]

3. *The Reverse Discrimination Litigation.* In 1982, immediately following the promotion of the first black Fire Lieutenant in BFRS history, "passed over" while males in the BFRS and the City Engineering Department filed lawsuits against the City and the Board, claiming the promotion of blacks constituted reverse discrimination.[7]

Seven black plaintiffs in the original employment discrimination lawsuits against the City (the "Martin Intervenors") intervened to defend the lawfulness of the Decree, as they (and the United States) were obligated to do as signatories to the Decree. *See* Decree ¶ 3. In defending those reverse discrimination claims, the City and the Board acknowledged that they made race-conscious decisions, as contemplated by the Decree, but denied that they had violated Title VII or the Equal Protection Clause. Both contended that respondents were bound by the Decree and that the promotions were lawful because they were made pursuant to the Decree.

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[6] One respondent, Ronnie Chambers, was eligible for promotion to Fire Lieutenant only for 6 weeks. He never again scored high enough to be certified for rank order promotion, even had no blacks ever again been promoted by the City. 1991 DX 1-2.

[7] *Bennett v. Arrington*, No. CV-82-P-0850-S (N.D. Ala. filed April 14, 1982); *B.A.C.E v. Arrington*, No. CV-82-P-1852-S (N.D. Ala. filed August 30, 1982); *Garner v. City of Birmingham*, No. CV-82-P-1461-S (N.D. Ala. filed July 1, 1982); *Wilks v. Arrington*, No. 83-AR-2116-S (N.D. Ala. filed March 21, 1983); *Zannis v. Arrington*, No. CV-83-P-2680-S (N.D. Ala. filed November 7, 1983); and *Howard v. City of Birmingham*, No. CV-83-P-3010-S (N.D. Ala. filed December 15, 1983).

In December 1985, after a week-long trial on fourteen promotions of blacks to Fire Lieutenant and Fire Captain and one promotion to Civil Engineer, the district court rejected respondents' claims, holding that the claims were impermissible collateral attacks on the Decree and that the remedial measures provided by the Decree—including the challenged promotions—were lawful. *BRDEL*, 39 Fair Empl. Prac. Cas. 1431. On appeal, the Eleventh Circuit reversed and ordered a retrial, holding that because respondents were not parties to the Decree, they could not be collaterally estopped from attacking the Decree. *In re Birmingham Reverse Discrimination Empl. Litig.*, 833 F.2d 1492 (11th Cir. 1987) ("*BRDEL Appeal*"). This Court affirmed. *Martin v. Wilks*, 490 U.S. 755 (1989).[8]

In October 1991, the district court held a second trial on the same fifteen promotions tried in 1985. *Bennett*, 806 F. Supp. 926. The parties supplemented the 1985 trial record with evidence concerning the City's basis for entering the Decree, the Decree negotiations, and the effect of the Decree upon racial representation in the BFRS. On August 14, 1992, the district court denied respondents' claims and ruled that the failure to promote the 15 respondents did not violate the Constitution or Title VII, and that the Decree provided a complete defense to respondents' reverse discrimination claims.

Respondents appealed that decision; on May 4, 1994, the Eleventh Circuit overturned it. Although holding that the City had a compelling governmental interest in redressing past discrimination, the Eleventh Circuit held that the Decree was unlawful under Title VII and the Equal Protection Clause. *BRDEL Appeal II*, 20 F.3d 1525. Despite the lack of evidence that respondents rather than the blacks in question would have been promoted in a non-discriminatory regime, the Eleventh Circuit accepted respondents' claims that blacks were promoted to positions to which respondents were entitled. The only evidence of entitlement shown by respondents was based on the

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[8] The district court's 1985 findings of fact "were not set aside on the appeal and under the law of the case remain as determinations." *Bennett*, 806 F. Supp. 927 n.2.

previous discriminatory system, under which white males received all the promotions. *See infra* at pp. 15-17.

In reversing the district court, the Eleventh Circuit did not attempt to balance the admittedly compelling interest in redressing past discrimination against the actual impact of the Decree on nonminorities. Instead, it ignored the evidence showing that nonminorities had been insignificantly burdened in practice, and found the Decree unlawful for three reasons based on the technical construction of the Decree: first, the 50% annual promotional goal for Fire Lieutenant was "arbitrary" and "wooden" because it was not tied to the percentage of black Firefighters; second, less restrictive goals may have provided some relief; and third, the goal of achieving a racially balanced workforce is unconstitutional.

REASONS FOR GRANTING THE WRIT

This case presents several broad issues of national importance concerning race discrimination in employment, affirmative action, and reverse discrimination. The Eleventh Circuit's decision disregards or misinterprets several of this Court's prior decisions, including *Paradise*, *Weber*, *Johnson*, *Wygant* and *Sheet Metal Workers*,[9] and conflicts with the law of other circuits. Equally important, the Eleventh Circuit's decision severely undermines affirmative action by establishing several illogical and unprecedented rules: that reverse discrimination plaintiffs are entitled to the continuation of racial discrimination in their favor; that relatively minor delays in promotions—without layoffs or demotions—unduly trammel the rights of nonminorities; and that the Constitution and Title VII forbid quick relief and favor slow relief that prolongs the duration of affirmative action.

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[9] *United States v. Paradise*, 480 U.S. 149 (1987) (plurality op.); *United Steelworkers of Am. v. Weber*, 443 U.S. 193 (1979); *Johnson v. Transportation Agency*, 480 U.S. 616 (1987); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986); *Local 28 of the Sheet Metal Workers Int'l Ass'n v. EEOC*, 478 U.S. 421 (1986).

Both the district court and the Eleventh Circuit agreed that Birmingham faced a compelling need to redress its own employment discrimination. Indeed, when the Decree was entered, Birmingham had never had a single black person in any of the nearly 150 promotional positions in its fire department. Nevertheless, the Eleventh Circuit has held that the very first promotions of black firefighters in the history of Birmingham violate the Constitution and Title VII. This Court previously considered this case important enough to hear on a procedural issue. *Martin*, 490 U.S. 755. Now, it comes before the Court on crucial substantive issues of affirmative action. The standards created by the Eleventh Circuit put at risk affirmative action programs previously thought to be lawful that redress egregious prior discrimination. This Court should grant certiorari to reverse the Eleventh Circuit's crippling decision.

I. THE ELEVENTH CIRCUIT OVERTURNED A REMEDIAL AFFIRMATIVE ACTION PLAN THAT WAS VALID UNDER THIS COURT'S SETTLED PRECEDENTS.

A. The Target Rate of Promotions May Be Set at a Fixed Percentage that Exceeds the Percentage of Minority Workers in the Entry Level Pool in Order to Accelerate the Relief and the Termination of Affirmative Action.

The Eleventh Circuit held that the 50% promotional goal for Fire Lieutenant is unlawful because it "is completely uninfluenced by the percentage representation of blacks in the firefighter ranks" and "appears entirely arbitrary". *BRDEL Appeal II*, 20 F.3d at 1542. In *Paradise*, 480 U.S. at 179, this Court reviewed and rejected an identical argument:

> The Government suggests that the one-for-one [promotional] requirement is arbitrary because it bears no relationship to the 25% minority labor pool relevant here. This argument ignores that the 50% figure is not itself the goal; rather it represents the speed at which the goal of 25% will be achieved.

See also Weber, 443 U.S. at 208-09 (upholding lawfulness of accelerated interim goals that "end as soon as the percentage of black skilled craftworkers . . . approximates the percentage of blacks in the local labor force"); *Sheet Metal Workers*, 478 U.S. at 450 ("A district court may find it necessary to order interim hiring or promotional goals pending the development of nondiscriminatory hiring or promotion procedures."); *Aiken v. City of Memphis*, 37 F.3d 1155, 1164-1165 (6th Cir. 1994) (*en banc*) (A 20% minimum promotional goal unrelated to the relevant labor pool "is merely a means of speedily realizing the long-term goals of the Decrees. And the result realized in *Paradise* makes clear that it is a permissible means of realizing those goals."). Here, as in *Paradise*, the 50% promotional goal was designed to hasten the day on which the goals themselves would terminate and in fact did so.[10]

The district court found that the City's pool of Firefighters was tainted by past discrimination, rendering it unfit as a basis for determining the proper composition of BFRS promotional positions. *Jefferson County*, 28 Fair Empl. Prac. Cas. at 1837-38. Indeed, that conclusion is incontrovertible given the earlier finding—now law—that the entry-level tests were unlawful. Utterly ignoring that finding, the Eleventh Circuit invalidated the Decree's 50% promotional goal because "it is imperative"

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[10] The Eleventh Circuit improperly attempted to limit *Paradise* to court-ordered affirmative action intended to combat a long-term defiance of court orders to develop non-discriminatory practices. *BRDEL Appeal II*, 20 F.3d at 1543. That limitation both misreads *Paradise* and subverts its intent. First, *Paradise* contains no such limitation; nor is there any reason to believe that its rationale—hastening the elimination of the effects of discrimination and the swift movement to a race-neutral system—is not equally served in situations where voluntary affirmative action is undertaken to avert a judicial determination of liability. *Aiken*, 37 F.3d at 1164-65. Second, not only did the City exclude blacks from the BFRS by law, 1979 PX 7 at 47; 1985 DX 1982-84, DX 1986, DX 1988, and DX 1991, but both before and after the Decree was entered, white supervisors discriminated against blacks in evaluation, training, distribution of assignments and employment conditions. 1979 PX 70 at 7, PX 37 at 146-57, PX 39; 1985 Tr. 496, 858, 866-70, 877-80, 953-54. The employment history of the BFRS demonstrates a far more steadfast, deep-rooted culture of discrimination than that present in *Paradise*.

that any lawful promotional goal "be related in some reasonable manner to the representation of blacks among firefighters." *BRDEL Appeal II*, 20 F.3d at 1543. Not only does that holding misconstrue the nature of an interim annual goal, *see infra* at pp. 17-25, but it also conflicts with this Court's recognition that a feeder position is *not* the relevant labor pool if that pool is tainted by past discrimination. *See Paradise*, 480 U. S. at 168 (plurality op.); *Weber*, 443 U.S. at 214 (Blackman J., concurring). *See also Ensley Branch*, 31 F.3d at 1577 (analyzing the Decree at issue here; holding that affirmative action may lawfully adjust for a labor pool tainted by past discrimination); *Stuart v. Roache*, 951 F.2d 446, 452-453 (1st Cir. 1991) (Breyer, J.) ("Obviously, if few blacks become police officers, few will become sergeants . . . [i]ndeed, litigated court findings of recent entry-level discrimination would seem sufficient to justify race conscious remedies at both entry and promotional levels."), *cert. denied*, 112 S. Ct. 1948 (1992).

Furthermore, the uncontroverted evidence at trial established that the percentage of blacks in an untainted labor pool for BFRS jobs exceeded the percentage of blacks in the civilian labor force, 1991 Tr. 152-53, 156-57, and that the City's civilian labor force was 49.9% black in 1980. 1985 PX 23. Thus, the Court invalidated a flexible plan that established a temporary 50% annual target that was *less* than the relevant labor pool for the jobs at issue.

B. The Achievement of a Racially Balanced Workforce is not an Unconstitutional Goal as a Remedy for Egregious Discrimination.

The Eleventh Circuit held the Decree's long-term goals unconstitutional because they were intended to "achieve outright racial balancing." *BRDEL Appeal II*, 20 F.3d at 1548. As discussed *infra* at pp. 17-18, the district court properly interpreted those goals as "largely hortatory". But, even were the long-term goals designed to *achieve* a racial balance, they would be fully constitutional because the imbalance results from unlawful discrimination. This Court has clearly upheld the achievement (but not the maintenance) of a racially balanced

workforce as a constitutional remedy for discrimination. In *Paradise*, the 50% hiring and promoting was to continue until the goal of 25% representation (the approximate minority population in the workforce) was achieved at both levels. 480 U.S. at 179. In *Johnson*, this Court upheld a plan with a long term goal of achieving a workforce that reflected the representation of women and minorities in the community. 480 U.S. at 635. This Court has found that minority representation in the population provides an apt benchmark against which to measure the elimination of discrimination. *Weber*, 443 U.S. at 208; *see also Stuart*, 951 F.2d at 450-51; *Davis v. City and County of San Francisco*, 890 F.2d 1438, 1446-47 (9th Cir. 1989), *cert. denied*, 498 U.S. 897 (1990); *Higgins v. City of Vallejo*, 823 F.2d 351, 356 (9th Cir. 1987), *cert. denied,* 490 U.S. 1057 (1989).

Here, all numerical Decree goals for Fire Lieutenant *ended* in 1989, when the percentage of black Fire Lieutenants exceeded 28%—the percentage of blacks in the civilian workforce of the county in 1980. 1991 DX 2, DX 12. From that point forward, the City's promotion of Fire Lieutenants has been entirely free from the Decree's numerical goals. Thus, the plan is "not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance". *Weber*, 443 U.S. at 208.[11]

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[11] To support its erroneous view, the Eleventh Circuit relied on *City of Richmond v. Croson Co.*, 488 U.S. 469, 507 (1989), for the proposition that affirmative action goals cannot assume "minorities will choose a particular trade in lockstep proportion to their representation in the local population." *BRDEL Appeal II*, 20 F.3d. at 1548. *Croson* does not support the Eleventh Circuit's holding for two reasons. First, the language quoted from *Croson* concerns the basis for determining whether a substantial governmental interest exists—a proposition not in dispute here. *Croson* is silent on the question of whether, when faced with a compelling governmental interest in redressing its own past discrimination, a public employer may seek to attain a racially balanced workforce through affirmative action. Second, no such assumption was made here. The City's expert witness testified without challenge that the composition of blacks in the relevant external labor pool for BFRS jobs is greater than their representation in the civilian work pool generally. 1991 Tr. 152-53, 156-57.

II. THE ELEVENTH CIRCUIT'S DEFINITION OF WHAT "UNNECESSARILY TRAMMELS" THE RIGHTS OF NON-MINORITIES IS INCONSISTENT WITH THIS COURT'S PRECEDENTS AND UNJUSTIFIABLY LOWERS THE BURDEN OF PROOF FOR REVERSE DISCRIMINATION PLAINTIFFS.

A. The Eleventh Circuit's Error in Granting Relief Where Respondents' Only Claim of Job Entitlement was Based on an Unlawful Selection Process Undermines All Affirmative Action.

Respondents base their request for relief on the theory that, had the prior discriminatory system continued in force, they would have received the promotions they were temporarily denied by the implementation of the Decree. Even if true, respondents' theory is not a legitimate basis upon which to find the Decree unlawful. By misinterpreting the district court's finding that respondents would have been promoted absent the Decree, *see* 20 F.3d at 1542, the Eleventh Circuit has adopted a truly bizarre rule of law, under which the historical beneficiaries of race discrimination are granted an entitlement to the continuation of such treatment.

The district court recognized that, absent the Decree, respondents "would . . . have been appointed to the positions they desired and about which they here complain," *BRDEL*, 39 Fair Empl. Prac. Cas. at 1433. However, that finding *assumed continuation of the City's demonstrably unlawful procedures that excluded blacks and women.* In every reverse discrimination case, if the old discriminatory scheme were kept in place, white male plaintiffs would have received more of the positions or promotions they sought. That fact, of course, is not a bar to affirmative action. *See Johnson*, 480 U.S. 616; *Paradise*, 480 U.S. 149. Neither this Court nor any circuit court other than the Eleventh Circuit has ever held that an expectation based on prior discrimination creates any rights at all for non-minorities. *See Edwards v. City of Houston*, 37 F.3d 1097, 1115 (5th Cir. 1994) ("The union members must compete fairly for

promotions; they do not have a vested interest in continuing to receive the benefits of past discrimination.") Yet that expectation is precisely what the Eleventh Circuit endorsed when it misapplied the district court's finding.

The district court found that respondents would have been promoted if the City had continued to promote in rank order based on tests and seniority points that illegally favored non-minorities. Indeed, absent the Decrees, and had the City and the Board adhered to their past practices, no blacks would have been promoted in the BFRS to this day. Appendix to Post-Trial Brief for Defendants, November 12, 1991 at Ex. D (summarizing 1991 DX 1-2). The district court did not find that respondents would have been promoted in a non-discriminatory regime; indeed, respondents introduced no evidence whatsoever from which such a conclusion could possibly be drawn. Instead, the district court found:

> the plaintiffs have not demonstrated that any of the individual plaintiffs were at the time of their promotion demonstrably better qualified than any of the blacks certified from the same eligible register based on the results of a job related selection procedure.

BRDEL, 39 Fair Empl. Prac. Cas. at 1444 ¶ 97. Respondents did not challenge that finding in the 1991 trial or on appeal.

The 1976 trial established that the police and fire entrance examinations do not qualify as job-related selection procedures. *Ensley Branch*, 14 Fair Empl. Prac. Cas. 670. The Eleventh Circuit affirmed that finding and this Court did not review it. 616 F.2d 812 (5th Cir.), *cert denied*, 447 U.S. 1061 (1980). At the 1979 trial, the United States and private plaintiffs submitted a great deal of uncontroverted evidence proving that many of the tests and other selection devices used by the Board and City were unlawful. *See generally* 1979 PX 60, DX 63. In 1985, the district court explicitly found that higher scores on the Board's examinations did not prove superior qualification for hiring or promotion, because the examinations had not been proved to be job-related and because respondents had failed to demonstrate they were better qualified than the black promotees, *BRDEL*, 39

Fair Empl. Prac. Cas. at 1447 ¶¶ 144-148; the district court specifically rejected each of the measures proposed by respondents to prove their superior qualifications. *Id.* at 1438-1444 ¶¶ 24-97.

The Eleventh Circuit's conclusion that respondents' "failure to be promoted" constitutes unnecessary trammelling rests on the erroneous assumption that respondents would have been promoted in a nondiscriminatory system. Respondents cannot base a claim of reverse discrimination on the premise that the City and the Board would continue to discriminate in their favor. This Court should grant *certiorari* to correct the Eleventh Circuit's error in accepting that rationale and to re-affirm what seemed obvious prior to the Eleventh Circuit's ruling: reverse discrimination plaintiffs cannot invalidate affirmative action programs by proving merely that they would have been promoted if discrimination in their favor were continued.

B. A Slight Promotional Delay Does Not Unnecessarily Trammel the Rights of Non-Minorities and is Narrowly Tailored.

When evaluating whether race-conscious employment measures by a public employer are narrowly tailored, a court must consider "the necessity for the relief and the efficacy of alternative remedies; the flexibility and duration of the relief, including the availability of waiver provisions; the relationship of the numerical goals to the relevant labor market; and the impact of the relief on the rights of third parties." *Paradise*, 480 U.S. at 171 (citing *Sheet Metal Workers*, 478 U.S. at 481, 486). On four occasions, the district court has conducted that balancing and concluded that the grave need for swift affirmative action by the City far outweighed the relatively minor disruption to the expectations of nonminorities.

In 1981 the district court found: "The goals and quotas here under attack are well within the limits upheld as permissible in these decisions. First, they do not preclude the hiring or promotion of whites and males even for a temporary period of time."

Jefferson County, 28 Fair Empl. Prac. Cas. at 1836. It reiterated in 1985:

> Nor are the interest[s] of whites trammelled by the Decree. Since the entry of the Decree, some have been promoted immediately upon certification, others after only a delay, and those not promoted have had or will have an opportunity to compete as each new exam is given and an eligible register (which is valid for only a year) is created.

BRDEL, 39 Fair Empl. Prac. Cas. at 1437 ¶ 14. In modifying the Decree in 1991, the district court concluded that the Decree's long-term goals were "largely hortatory". *Jefferson County*, No. CV 75-P-666-5 (May 21, 1991) at A177.

Consistent with that interpretation, after receiving evidence of the Decree's actual operation and the alleged burden on nonminorities, the district court held that the Decree did not trammel the rights of nonminorities and was narrowly tailored:

> [The 1985] findings show that the effect on third parties, specifically the white firefighters complaining of racial discrimination in this case, is an acceptable burden. There were no provisions to use layoffs as a means for favoring junior black employees over more senior white employees, nor was there an absolute bar to promotions for white Department members, since half of the promotions would be whites. *See Johnson*, [480 U.S. at 631-32].

Bennett, 806 F. Supp. at 931. After carefully evaluating the factors outlined in *Paradise*, the district court concluded: "These factors, applied to the facts of this litigation, show that the decree is limited and tailored to the relief necessary to overcome the employment effects of past discrimination by the City." *Bennett*, 806 F. Supp. at 929.

In ruling that a short delay in promotion trammelled the rights of respondents, the Eleventh Circuit disregarded clear Supreme Court precedent and replaced the actual operation of the Decree's goals with its own theoretical discussion based on abstract rhetoric that ignores this Court's decisions and gives

no deference to the district court's findings.[12] The Eleventh Circuit made no attempt whatsoever to conduct the balancing required by *Paradise* and *Sheet Metal Workers,* ignoring both the desperate need for swift affirmative action in Birmingham and the *actual effects* of the Decree on nonminorities. Indeed, no other court has ever held that promotional delays—however great—constitute unnecessary trammelling; the courts have consistently reserved that stigma for plans requiring the discharge or layoff of nonminorities.

The following facts are undisputed. From the entry of the Decree until the 1991 trial, the BFRS had promoted 51 blacks and 93 whites.[13] Indeed, nearly 80% of the white males who would have been promoted in the BFRS absent the Decree[14]

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[12] "[A]ppellate courts must constantly have in mind that their function is not to decide factual issues *de novo*"; an appellate court should not "reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently." *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985). Here, deference to the district court is particularly important because, for more than 20 years, a single district court judge has presided over the initial discrimination lawsuits brought by the United States and private plaintiffs, the entry of the Decree, the reverse discrimination lawsuits and the Decree modification proceedings. *See Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 112 S. Ct. 748, 765 (1992) (O'Connor, J. concurring) ("Our deference to the District Court's exercise of its discretion is heightened where, as in this litigation, the District Court has effectively been overseeing a public institution over a long period of time . . . we accordingly owe substantial deference to 'the trial judge's years of experience with the problem at hand'" (quoting *Hutto v. Finney*, 437 U.S. 678, 688 (1978))).

[13] We count an individual who has earned two successive promotions as two "persons" or two "white males", as the case may be. The statistics concerning delay in BFRS promotions are based on 1991 DX 1-2.

[14] For purposes of this discussion, "promoted absent the Decree" assumes that the City continued to hire and promote based upon rank order certification resulting from a combination of existing tests and seniority points—an admittedly unlawful procedure, not demonstrably job-related and fraught with adverse impact against blacks. Likewise, the calculations of "delay" measure the difference between what happened under the Decree and what would have happened *had the discriminatory system been left in place*

were in fact promoted. More than half were promoted with no delay at all, and only 15% had to sit for an additional examination before being promoted. As of the 1991 trial, only fourteen white males who would have been promoted absent the Decree had not yet been promoted.[15] Thirteen of those, however, would have been promoted (absent the Decree) only on the most recent exam given for the position sought.

The average Decree-based delay of all white males who have taken, passed, and scored well enough on promotional exams in the BFRS to be promoted strictly according to rank order is approximately seven and one-half months. White male candidates for Fire Captain have been delayed an average of approximately five and one-half months, and white male candidates for Fire Lieutenant have been delayed an average of approximately nine months.

Promotional delays as slight as those involved here simply cannot be said unduly to trammel the "rights" of white males, particularly because even those "delays" are based on the assumption that discrimination in favor of white males would continue—to which they have no "right". Furthermore, the Eleventh Circuit's holding cannot be squared with this Court's prior decisions.

Remedial affirmative action may lawfully impair the interests of nonminorities:

> As part of this Nation's dedication to eradicating racial discrimination, innocent persons may be called upon to bear some of the burden of the remedy. When effectuating a

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intact. It would be a serious mistake to assume that those white males whose promotions have been delayed had any entitlement to earlier promotion, or that the "delay" actually measures the burden borne by white males.

[15] Seven other white males were deemed unqualified by the BFRS Promotional Review Board (whose decisions are made without regard to the Decrees), and five others did not score well enough on the most recent promotional exam to be promoted based strictly on rank order (thus, as of the time of the trial, they were not presently eligible for promotion for reasons unrelated to the Decree).

> limited and properly tailored remedy to cure the effects of prior discrimination, such a 'sharing of the burden' by innocent parties is not impermissible.

Wygant, 476 U.S. at 280-281 (internals citations omitted). Even preferring less qualified minorities over more qualified nonminorities (of which there is no proof here) is perfectly legal:

> In cases involving valid hiring goals, the burden to be borne by innocent individuals is diffused to a considerable extent among society generally. Though hiring goals may burden some innocent individuals, they simply do not impose the same kind of injury that layoffs impose. Denial of a future employment opportunity is not as intrusive as loss of an existing job.

Id. at 282-83 (emphasis omitted).

For example, in *Weber*, this Court held that the reservation for blacks of 50% of the openings in a training program until a racial balance was achieved did not unnecessarily trammel the interests of the white employees.

> The plan does not require the discharge of white workers and their replacement with new black hirees. Nor does the plan create an absolute ban to the advancement of white employees . . .[it] is a temporary measure; it is not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance.

443 U.S. at 208 (citations omitted).

In *Johnson* this Court upheld a plan which, by allowing sex to be one of the factors in making a promotional decision, may have resulted in the denial of a promotion to the petitioner (and almost certainly resulted in the denial of a promotion to some male). This Court approvingly noted that even though promotional opportunities may have been delayed, the plaintiff in that case "retained his employment with the Agency, at the same salary and with the same seniority, and remained eligible for other promotions." 480 U.S. at 638.

Similarly, in *Paradise*, this Court held that a promotional goal "only postpones the promotion of qualified whites . . . . Denial of a future employment opportunity is not as intrusive as loss of an existing job, and plainly postponement imposes a lesser burden still." 480 U.S. at 183 (internal quotation marks and citations omitted).[16]

The Eleventh Circuit's characterization of the 50% Fire Lieutenant interim goal as a "rigid, arbitrarily selected quota", *BRDEL Appeal II*, 20 F.3d at 1543, ignores this Court's decisions, the flexibility built into the Decree and the City's actual promotional practices under the Decree. The Eleventh Circuit interpreted the Decree as follows:

> when the plan was created, the City employed 42 black firefighters and 411 non-black firefighters. The decree set aside half of all future promotions to fire lieutenant for those among the 42 black firefighters who became Board-certified as eligible. By virtue of the rigid manner in which the City has used race to determine promotions under the decree, 42 black firefighters, because of their race, gained an exclusive claim to half of all fire lieutenant promotions made under the plan, but lost any possibility of competing for the other half. On the other hand, the remaining 411 non-black firefighters saw the number of promotions to which they might aspire, absent the consideration of their race, cut from 100% to half of all lieutenant promotions.

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[16] The Eleventh Circuit itself in *Howard v. McLucas* held that when "the [promotional] relief does not prevent white employees from being promoted . . . [and] [w]hite employees are at most delayed from receiving a promotion to a limited number of specific positions" the rights of white employees are not "trammelled". 871 F.2d 1000, 1009 (11th Cir.), *cert. denied*, 493 U.S. 1002 (1989). *See also Higgins*, 823 F.2d at 360 ("[P]romotion guidelines are even less intrusive than hiring goals. Like hiring goals, promotion guidelines visit a minor burden on non minority employees. But unlike hiring goals, promotion guidelines do not require that an individual bear the burden of past discrimination to the extent that he or she is denied a livelihood.").

BRDEL Appeal II, 20 F.3d at 1542 (internal citation omitted). That interpretation is unsupported by the findings, by any contention that the contrary findings of the district court were clearly erroneous, or by any record evidence.

First, the 50% goal does not require that *any* positions be set aside for blacks or whites. Instead, every annual goal, including the 50% goal for Fire Lieutenant, is explicitly made "*subject to the availability of qualified black applicants*", Decree ¶ 6 (emphasis added), and compels the City only to "attempt to meet" it. *Id.* Regardless of the Fire Lieutenant goal or any other goal, the Decree does not "require[] the City to hire unnecessary personnel, or to hire, transfer or promote a person who is not qualified". *Id.* at ¶ 2. If the City does not need more Fire Lieutenants, as in 1984, none are promoted. 1991 DX 2. *See Paradise*, 480 U.S. at 177-78 (plan flexible because promotional requirement waived either if no qualified black candidates available or when promotions unnecessary or not economically feasible).

Second, the Decree was not implemented in the wooden manner imagined by the Eleventh Circuit, in which every other Lieutenant promotion went to a black Firefighter. The 50% Fire Lieutenant goal was in effect for nine calendar years, expiring early in 1989. 1991 DX 12. In only *two* of those years were promotions to Fire Lieutenant split evenly between blacks and whites. In *four* years the City fell short of the 50% annual goal—*without consequence*. 1991 DX 1-2. The evidence shows, and the district court found, that the goals were not rigidly applied.[17] In fact, from the entry of the Decrees until the 1991 trial, 95 of the 145 BFRS promotions (65%) went to white males. White males accounted for 60% of the Fire Lieutenant promotions, 72% of the Fire Captain promotions, and 91% of the Battalion Chief promotions. 1991 DX 21-23; 1985 DX

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[17] For example, in 1983, the City made three sets of Fire Lieutenant promotions but did not "woodenly" adhere to the 50% annual goal: one white man was promoted January 22, three white men were promoted March 19, and two white men and three black men were promoted August 6. 1991 DX 2. No opening was *ever* designated as "for whites" or "for blacks".

2214-2215. Thus, the record contradicts the Eleventh Circuit's findings that "[i]f four fire lieutenant positions are open, two of those will be filled by blacks and two by non-blacks", and that "no non-black employee can compete for the [] openings designated for blacks". *BRDEL Appeal II*, 20 F.3d at 1535.[18]

The record evidence of the Fire Lieutenant promotions under the Decree proves that the 50% goal in fact operated as a flexible goal, not a "rigid quota". Even if there were contrary record evidence—which there is not—the Eleventh Circuit is not free to ignore the district court's factual findings and review the record *de novo*. *Anderson*, 470 U.S. at 573.[19]

Third, the Eleventh Circuit disapproved of the 50% goal because, in its view, that goal lasted "indefinitely": the court contrasted it to the decree approved in *Howard*, 871 F.2d 1000 which "evaporated after . . . 240 promotions were made". *BRDEL Appeal II*, 20 F.3d at 1547. In fact, the 50% Fire Lieutenant goal expired in March 1989—five years *before* the Eleventh Circuit's decision—when the long-term goal was met; less than eight years after it took effect; and after only 39 blacks had been promoted to Fire Lieutenant. 1991 DX 2 and DX 12. If, as suggested by the Eleventh Circuit, the Decree had set a

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[18] Likewise, the 42 then-incumbent black Firefighters discussed by the Eleventh Circuit were not the sole beneficiaries of the 50% goal; many black Firefighters hired after entry of the Decree benefitted as well. Indeed, Firefighters of both races hired after entry of the Decree were promoted to Fire Lieutenant while the goal was in effect, and Firefighters of both races hired prior to the Decree's entry were not promoted during that time. 1991 DX 2; 1985 DX 1431.

[19] The Eleventh Circuit implied that instead of the 50% goal, a promotion rate of twice the representation of blacks in the entry level position would have been lawful. *BRDEL Appeal II*, 20 F.3d at 1543. Assuming rigid adherence to that goal, the Eleventh Circuit's suggestion would have resulted in the promotion of 34 blacks to Fire Lieutenant between 1981 and 1989, instead of the 39 actually promoted under the 50% goal. *See* 1991 DX 1-2 and Def. App. at Ex.C. The distinction between the 50% rate of promotion and the rate tied to the entry level work force is meaningless. The promotion of five additional blacks cannot convert lawful promotions into unconstitutional trammeling.

goal equal to black representation in the pool of Firefighters, *BRDEL Appeal II* 20 F.3d at 1543, only 16% of the Fire Lieutenants would have been black in 1989 and the goal would have continued far into the future.[20] Thus, the acceleration of the short-term goal hastened the termination of affirmative action; although "indefinite", the conservatively set long-term goal was quickly met, causing prompt expiration of both. Furthermore, the district court has exercised continuing supervision over the Decrees—modifying, terminating or reducing many of the goals in 1991—and is likely to continue to do so in the future. *Jefferson County*, No. CV 75-P-666-S (May 21, 1991), A166; *United States v. Jefferson County*, No. CV 75-P-666-S (N.D. Ala. entered September 25, 1991), reprinted in the Appendix at A181; *Ensley Branch,* 31 F.3d 1548. That continuing supervision also mitigates any "indefiniteness" in the goals' duration.

Given the undisputed facts concerning the Decree's actual operation—facts utterly ignored by the Eleventh Circuit—the Decree cannot be said to trammel unnecessarily the rights of white males. Here, no white males have been fired, demoted or laid off. They have been forced to accept only a slight delay in what might have happened to them even if the City and the Board had continued to discriminate in their favor. Thus, the Decree, including the long-term and interim percentage goals, has not unduly trammelled the rights of white males and is well within the range of remedial affirmative action previously approved by this Court.

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[20] Tying the Fire Lieutenant promotions to the Firefighter pool would have had a domino effect: instead of having nine black Fire Captains (26%) and one black Battalion Chief (7%) in 1989, Birmingham would have had only two black Captains (6%) and no black Battalion Chiefs (0%). *See* 1991 DX 1-2; Def. App. at Ex. C.

C. Narrow Tailoring Does Not Require an Employer to Attempt Slower, Less Effective Remedies Rather than Effective Remedies that Terminate Sooner.

The Eleventh Circuit invalidated the Decree in part because it held that "[w]here relief is not provided to identified victims of discrimination . . .race neutral alternatives should be considered before a government implements an affirmative action plan". *BRDEL Appeal II*, 20 F.3d at 1545-46.[21] Here, however, the record indisputably establishes the City's broad consideration of alternatives.

The district court explicitly found that, prior to negotiating a settlement of the discrimination litigation, the City had considered and attempted a variety of types of affirmative action, and that those mechanisms had been largely unsuccessful. *Bennett*, 806 F. Supp. at 929-30; *see Jefferson*

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[21] To the extent the Eleventh Circuit's decision rests on a heightened threshold for consideration and trial of alternatives if the relief does not benefit specifically identified victims of discrimination, it is contrary to established precedent. *See Local 93, Int'l Ass'n. of Firefighters v. City of Cleveland*, 478 U. S. 501, 516 (1986) ("voluntary action available to employers and unions seeking to eradicate race discrimination may include reasonable race-conscious relief that benefits individuals who were not actual victims of discrimination"); *see also Paradise*, 480 U.S. at 166; *Sheet Metal Workers*, 478 U.S. at 480. Indeed, the Eleventh Circuit's attempt to distinguish its own earlier precedent, *Howard*, 871 F.2d 1000, as a case in which a consent decree "was intended to provide specific relief to victims of past discrimination", not only exposes the Eleventh Circuit's adherence to a principle rejected by this Court, but also is wholly mistaken. The promotions in *Howard* were not actually awarded to victims of past discrimination; instead, the number of promotions awarded was determined by statistical evidence which estimated the number of victims of past discrimination. *Howard v. McLucas*, 671 F. Supp. 756, 762-763, *aff'd*, 871 F.2d 1000 (11th Cir.), *cert. denied*, 493 U.S. 1002 (1989). Here, unrefuted statistical evidence established that, absent discrimination, more than 28% of BFRS Fire Lieutenants would be black. 1991 Tr. 149-50, 151-53, 156-57.

County, 28 Fair Empl. Prac. Cas. at 1838.[22] Indeed, only after the district court found the entry-level fire and police tests unlawful and ordered the Board to replace rank-order certification with certification of blacks for Firefighter in proportion to the number of black applicants did the City make any progress—and then only at the entry level. *Ensley Branch*, 14 Fair Empl. Prac. Cas. 670. The Eleventh Circuit approved that relief. 616 F.2d 812.

Similarly, the City sought to convince the United States and private plaintiffs to consider and accept less restrictive alternatives while negotiating the terms of the settlement. In some instances its efforts were successful, as with use of the county labor pool figure (28%) for the long-term goals rather than the citywide figure (49.9%), 1991 DX 31 at 10 ¶ 6B, DX 33 at 3 ¶ 5; 1991 Tr. 58-59, 61-64, 80-81; Decree ¶ 5, and the City's insistence that all Decree goals explicitly be limited by the availability of qualified applicants. Decree ¶¶ 5-8, 9(b), 10(b); *see generally id.* at ¶ 14. However, the United States and private plaintiffs did not always agree with the City's efforts to reduce relief, as with the City's attempt to scale back the 50% interim goals to 35%. 1991 Tr. 58-59, 61; 1991 DX 31 at 10 ¶ 6a, DX 33 at 4 ¶ 6.

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[22] For example, following a study in the early 1970's, evidencing employment discrimination against blacks, the City adopted an affirmative action ordinance. 1991 Tr. 96-98. Consistent with the ordinance, departmental heads were required to submit annual plans to improve minority hiring. 1991 PX 12 at 75. However, the results achieved by those plans were woefully inadequate. *Id.* at 81. Likewise, for a decade or more prior to the Decree's adoption, the Board attempted a variety of affirmative action measures, including: advertising job vacancies in the mass media specifically targeted to the black community, 1979 Tr. 697, 700; elimination of application fees, medical examination fees, voter registration and residency requirements to encourage minority applications, *id.* at 699; recruiting drives directed at predominately black schools, *id.* at 700; distribution of job announcements to predominantly black civic and religious organizations, *id.*; and adoption of a procedure by which the Board would provide hiring authorities with enhanced certification lists including qualified lower-ranking minority candidates. *Id.* at 709-10. The Engineering department also made efforts to recruit blacks and women, 1979 PX 38 at 28-33.

Unable to dispute the City's consideration of alternatives, the Eleventh Circuit transformed that requirement into a holding that if less restrictive means might theoretically have provided some relief from past discrimination, the City could not constitutionally do more. Specifically, it ignored the fact that the increase in black representation from 1.89% to 9.3% in three years resulted from the district court's order requiring selective certification for entry-level Firefighters, and instead used that increase to justify its finding that "alternative measures designed to increase black representation in the fire lieutenant ranks were feasible." *BRDEL Appeal II*, 20 F.3d at 1546. The district court had made a factual determination that those court-ordered measures were not effective. The Eleventh Circuit disagreed, believing that some voluntary version of those measures could be more effective, and rejected the district court's findings as clearly erroneous.

The Eleventh Circuit's holding contravenes this Court's decisions in several ways. First, the Constitution does not require that relief provided in a racial discrimination case be the absolute minimum to redress past discrimination. This Court has not "required remedial plans to be limited to the least restrictive means of implementation." *Paradise*, 480 U.S. at 184 (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 508 (1980) (Powell, J., concurring)); *see also Stuart*, 951 F.2d at 455 (showing that earlier efforts to produce fair tests or reduce the effect of seniority on promotion have failed is sufficient consideration of alternative remedies).

Second, in essence, the Eleventh Circuit's holding is that the City must act slowly and over a long period of time instead of quickly and briefly. As discussed *supra* at pp. 2-8, the City was obligated to act to redress its own discrimination in hiring, and could do so until the vestiges of that discrimination were eradicated. The City could well have kept affirmative action in place until more than 50% of the BFRS was black, based on the relevant labor pool. Instead, the Decree continues affirmative action only until 28% is reached. The Eleventh Circuit's various "less restrictive" alternatives are merely slower alternatives that would have to be kept in effect longer. Establishing a

constitutional preference for such measures contravenes this Court's decisions in *Paradise*, *Weber* and *Sheet Metal Workers*, by failing to recognize that the 50% goal is "not itself the goal . . . but rather the speed". *Paradise*, 480 U.S. at 179. Here, where the promotional "delay" suffered by nonminorities is demonstrably negligible, *see supra* at pp. 19-20, neither the constitution nor Title VII favors slow, protracted relief over accelerated relief terminating more quickly.

Third, whatever the merit of the Eleventh Circuit's position, it is wholly inappropriate when applied to judicially approved and supervised settlements of discrimination litigation. If, in settling a discrimination lawsuit, the defendant is compelled to agree only to the absolute minimum relief that might make some difference, plaintiffs would have no incentive to settle such litigation. That result itself contravenes Title VII, which strongly favors voluntary employer action over litigation. *Weber*, 443 U.S. at 204 (Title VII intended as a "catalyst" for employer efforts to eliminate vestiges of discrimination); *Johnson*, 480 U.S. at 630-33.

Conclusion

For the foregoing reasons, the petitioners respectfully request this court to grant *certiorari* to review the decision of the Eleventh Circuit.

February 22, 1995

Respectfully submitted,

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(2)

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IN THE

Supreme Court of the United States

October Term, 1994

JOHN W. MARTIN, *et al.*,

Petitioners,

v.

ROBERT K. WILKS, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

APPENDIX

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STATUTORY AND CONSTITUTIONAL PROVISIONS

U.S. Constitutional Amendment XIV, § 1

The Equal Protection Clause provides, in relevant part, that "[n]o state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws". U.S. Const. amend. XIV, § 1.

42 U.S.C. § 2000e-2

Title VII of the Civil Rights Act of 1964 provides, in pertinent part:

> (a) It shall be unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire . . . or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race . . . ; or
>
> (2) to . . . classify his employees . . . in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race. . . .

42 U.S.C. § 2000e-2.

In re BIRMINGHAM REVERSE DISCRIMINATION EMPLOYMENT LITIGATION.

James A. BENNETT, Plaintiff,

Floyd E. Click; James D. Morgan; Joel Alan Day; Gene E. Northington; Vincent Joseph Vella; and Lane L. Dendard, Plaintiffs-Appellants, Cross Appellees,

v.

Richard ARRINGTON, Jr., as Mayor of the City of Birmingham; City of Birmingham; James B. Johnson; Henry P. Johnston; and Hirma Y. McKinney, as Members of the Jefferson County Personnel Board; Joseph W. Curtin, as Director of the Jefferson County Personnel Board; and Jefferson County Personnel Board; and Jefferson County Personnel Board, Defendants-Appellees,

John W. Martin, Major Florence, Ida McGruder, Sam Coar, Eugene Thomas, Charles Howard, Defendant-Intervenors-Appellees-Cross Appellants,

United States of America, Defendant-Intervenor-Appellee.

BIRMINGHAM ASSOCIATION OF CITY EMPLOYEES, an unincorporated labor association, and Kenneth O. Ware, Plaintiffs-Appellants, Cross Appellees,

Gerald L. Johnson; Philip H. Witley; David H. Woodall; Danny R. Laughlin; Marshall G. Whitson; Dudley L. Greenway, Plaintiffs,

v.

Richard ARRINGTON, Jr., as Mayor the City of Birmingham; City of Birmingham; City of Birmingham; James B. Johnson; Henry P. Johston; and Hiram Y. McKinney, as Members of the Jefferson County Personnel Board; Joseph W. Curtin, as Director of the Jefferson County Personnel Board; and the United States of America, Defendants—Appellees;

John W. Martin, Major Florence, Ida McGruder, Sam Coar, Wanda Thomas, Eugene Thomas and Charles Howard, Defendants-Intervenors-Appellees, Cross Appellees,

Robert K. WILKS; Carlice E. Payne; Ronnie J. Chambers; John E. Garvich, Jr., James W. Henson; Robert Bruce Millsap, Plaintiffs—Appellants, Cross Appellees,

United States of America,

Plaintiff-Intervor,

Howard E. Pope, Charles E. Carlin, Plaintiffs-Intervenors-Appellants,

v.

Henry P. JOHNSTON, Defendant,

John W. Martin, Major Florence, Ida McGruder, Sam Coar, Eugene Thomas and Charles Howard, Defendants-Intervenors-Appellees-Cross Appellants,

Wanda Thomas, Defendant, Intervenor.

No. 92-6778.

United States Court of Appeals,

Eleventh Circuit.

May 4, 1994.

Subsequent to entry of consent decrees in prior employment discrimination litigation, providing for plan to remedy discrimination against blacks in city's public service employment practices, white firefighters brought action against city and personnel board. The United States, a signatory of consent decrees, brought action against city and personnel board, asserting essentially the same allegations as individual firefighters. Following affirmance in part and reversal in part, 833 F.2d 1492, the Supreme Court, 490 U.S. 7565, 109 S.Ct. 2180, 104 L.Ed.2d 835, affirmed. Following remand for further trial, the United States District Court for the Northern District of Alabama, Nos. CV-84-0903-S, CV-82-P-00850-S, CV82-P-

01852-8, CV83-P-02116-S, Sam C. Pointer, Jr., Chief Judge, 806 F.Supp. 926, found for city. Appeal was brought. The Court of Appeals, Black, Circuit Judge, held that: (1) city presented sufficient evidence to allow trial court to make factual determination that employer had strong basis for its conclusion that remedial action was necessary, and thus thorough appellate review was permitted; (2) affirmative action plan unnecessarily trammeled rights of nonblack employees and thus violated Title VII; and (3) city did not properly consider efficacy of alternatives to race-based promotional quota system for fire lieutenants, for purposes of determining whether consent decree's quota plan was narrowly tailored to accomplish compelling purpose.

Affirmed in part, reversed in part, and remanded.

District court need not await party's motion to terminate consent decree over which court retains supervisory jurisdiction; when remedy prescribed in consent decree is accomplished, district court may sua sponte terminate decree.

Employers may develop affirmative action plans designed to further Title VII's purpose of eliminating effects of discrimination in workplace. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

Employer's decision to account for race in affirmative action plan is consistent with Title VII's objective of breaking down old patterns of racial segregation and hierarchy. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

Employer implementing race-conscious affirmative action plan must assure that race will be considered consistent with Title VII's purpose, and that interests of those employees not benefiting from plan will not be unduly infringed. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

In determining whether affirmative action plan was implemented consistent with Title VII's purpose and without unduly infringing interests of nonblacks, Court of Appeals was

required to first determine whether employer's consideration of race or promotional candidates was justified by manifest racial imbalance that reflected underrepresentation of blacks in traditionally segregated job categories, and, if such justification was present when plan was developed, to determine whether plan itself provided proper remedy for that imbalance. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

Remedy is proper under Title VII if affirmative action plan does not unnecessarily trammel rights of nonbeneficiary employees or create absolute bar to their advancement. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

For purposes of challenge under Title VII to affirmative action plan, when job requires no special expertise, determining whether manifest imbalance exists that would justify race-conscious decision making by employer involves comparison of percentage of minority employees in that job with percentage of minorities in general area labor market; however, when job requires special skills or training, appropriate comparison is to those in labor market who possess that special skill or training. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

In determining whether manifest imbalance existed that would justify race-conscious decision making by city in response to suit alleging that city violated Title VII in making promotions from firefighter to fire lieutenant, appropriate comparison was between black representation in lieutenant ranks and black representation among entry level firefighters. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

In Title VII action challenging affirmative action plan adopted by city to remedy discrimination against blacks in fire department, city presented sufficient evidence to allow trial court to make factual determination that employer had strong basis for its conclusion that remedial action was necessary, and thus *Croson* requirement that government entity identify with

specificity the discrimination it seeks to remedy was satisfied, and thorough appellate review was permitted; city was not required to make formal findings about its past discrimination, and district court found, inter alia, that blacks were not represented in lieutenant ranks. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

For trial court to conclude that remedial action under Title VII is warranted, there must be sufficient evidence to allow it to make factual determination that employer had strong basis in evidence for its conclusion that remedial action was necessary. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

Unless trial court makes factual determination that employer had strong basis in evidence for its conclusion that remedial action was necessary to redress Title VII violation, appellate court has no basis upon which to determine whether race-based action was justified as remedy for prior discrimination by city. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

City settling Title VII litigation by consent decree is not required to declare itself to have violated law by discriminating in employment, detailing elements of potential plaintiff's complaint in the process, before adopting affirmative action plan designed to remedy effects of its own past discrimination. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

Before city may settle Title VII litigation by consent decree, it is necessary that trial court make some finding that city engaged in past discrimination, in order to allow for proper judicial review of city's use of race in its affirmative action plan. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

Court of Appeals review district court's factual findings under clearly erroneous standard.

District Court's legal conclusions are subject to de novo review.

In Title VII action challenging affirmative action plan adopted by city to remedy discrimination against blacks in fire department, evidence was sufficient to support findings that manifest racial imbalance existed and that city was therefore justified in implementing affirmative action plan that provided for use of race as remedy; no department employees above rank of firefighter were black, and city was aware that district court had disapproved hiring tests because they had adverse impact on blacks. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

City's affirmative action plan, designed to remedy discrimination against blacks in fire department, unnecessarily trammeled rights of nonblack employees and thus violated Title VII; plan established right quota in that it made race the sole factor used to determine eligibility for lieutenant promotions, 50-percent figure chosen for quota was unrelated to percentage of blacks in firefighter ranks, 50-percent figure was to be in use indefinitely, and plan was entered pursuant to voluntary consent decree, not pursuant to court order to combat egregious refusal to follow court orders. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

Entry level hiring goals, while burdening some innocent persons, do not impose same type of injury on nonbeneficiaries as that imposed by use of race to determine employee layoffs, for purposes of determining whether affirmative action plan unnecessarily trammels rights of nonbeneficiaries under Title VII. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

Promotion situation lies somewhere between entry level hiring and layoffs in terms of burden permitted on nonbeneficiaries, for purposes of determining whether affirmative action plan unnecessarily trammels rights of nonbeneficiaries under Title VII. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

Under Title VII, affirmative action plan can unnecessarily trammel rights of nonminority employees without requiring

firings or layoffs.Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

Where nonminorities bore entire burden of race-based promotion remedy under city's affirmative action plan designed to remedy discrimination in the fire department, it was imperative under Title VII that remedy be related in some reasonable manner to representation of minorities in department. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

Governmental entity should take immediate steps to remedy its history of discrimination by awarding victims of that discrimination their rightfully earned promotions. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

Strict scrutiny is employed in examining racial classification under equal protection clause even though classification operates against a group not historically subject to discrimination by government. U.S.C.A. Const.Amend. 14.

To assure proper balance between individual rights secured by Fourteenth Amendment and permissible burden placed on innocent persons, use of race in government decision making is subject to strict judicial scrutiny to smoke out illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. U.S.C.A. Const.Amend. 14.

To survive challenge under equal protection clause, city's use of race in making promotion decisions was required to be justified by compelling interest and to be narrowly tailored to achieve that interest. U.S.C.A. Const.Amend. 14.

To survive challenge to its use of race in making promotion decisions under equal protection clause, city was required to show that compelling government purpose justified use of racial preference, and that means chosen was narrowly tailored to achieve that purpose. U.S.C.A. Const.Amend. 14.

Public employers are required to eliminate vestiges of prior racial segregation and discrimination. U.S.C.A. Const.Amend. 14.

While attempting to eliminate vestiges of past discrimination against persons of one race, government must minimize imposition of new discriminations on persons of other races. U.S.C.A. Const.Amend. 14.

Before governmental unit may execute affirmative action plan remedying prior discrimination by using race in narrowly tailored manner, showing must be made that governmental unit engaged in prior discrimination, and strong basis must exist in evidence that remedial action is warranted. U.S.C.A. Const.Amend. 14.

Even when city is justified in implementing affirmative action plan, only a plan that is carefully constructed will do. U.S.C.A. Const.Amend. 14.

Classifications based upon race carry a very real danger of harm because they threaten to stigmatize individuals by reason of their membership in a racial group. U.S.C.A. Const.Amend. 14.

Race conscious government policy justified by compelling purpose of remedying past discrimination must also use race in as limited a manner as possible to accomplish that compelling purpose. U.S.C.A. Const.Amend. 14.

Several factors determine whether race-based promotional relief is narrowly tailored to accomplish a compelling purpose, including necessity for relief and efficacy of alternative remedies, flexibility and duration of relief including availability of waiver provisions, relationship of numerical goals to relevant labor market, and impact of relief on rights of nonbeneficiaries. U.S.C.A. Const.Amend. 14.

City did not properly consider efficacy of alternatives to race-based promotional quota system for fire department lieutenants, for purposes of determining whether consent decree's quota plan was narrowly tailored to accomplish compelling purpose; city had increased number of black

firefighters fivefold prior to implementation of system, and city could have implemented plan that accounted for race of candidate as one factor among many to be considered. U.S.C.A. Const.Amend. 14.

Where relief is not provided to identified victims of discrimination, given odious nature of race-based decision making, race-neutral alternatives should be considered before government implements affirmative action plan using race as sole criteria upon which promotions are based. U.S.C.A. Const.Amend. 14.

Flexibility and duration of city's affirmative action plan, which included race-based promotional system for fire department lieutenants, was insufficient to allow finding that plan was narrowly tailored to accomplish compelling purpose; system placed great burden on small number of nonblack firefighters since lieutenant was the only position for which firefighter might reasonably compete, and in attempting to achieve government-mandated racial balancing, system perpetuated discrimination by government. U.S.C.A. Const.Amend. 14.

Fact that no relationship existed between numerical goal for fire lieutenant promotions and representation of blacks among firefighters compelled finding that city's affirmative action plan did not use race in narrowly tailored manner. U.S.C.A. Const.Amend. 14.

Pointed impact of relief on nonbeneficiaries compelled finding that city's race-based promotional quota system for fire department lieutenants, initiated pursuant to consent decree, was not narrowly tailored to accomplish compelling purpose; provisions of decree were to continue until racial balancing objective was achieved or until decree was terminated, and nonblack firefighters who constituted 90 percent of firefighters were consigned to competing for half of promotions to lieutenant. U.S.C.A. Const.Amend. 14.

Appeal from the United States District Court for the Northern District of Alabama.

Before EDMONDSON and BLACK, Circuit Judges, and HENDERSON, Senior Circuit Judge.

BLACK, Circuit Judge:

In the latest chapter of this ongoing litigation we determine whether certain provisions of a 1981 consent decree mandating that the City of Birmingham (City) select employees for promotion based upon their race can withstand scrutiny under Title VII of the Civil Rights Act of 1964 and the Equal Protection Clause of the Fourteenth Amendment. We hold that they cannot.[1]

I. Background

Appellants are fourteen male, non-black employees of the Birmingham fire rescue service (BFRS) and one male-non-black employee of the City engineering department.[2] Appellants assert that the City, acting pursuant to a consent decree it entered in 1981 to resolve then-pending litigation, violated their rights under Title VII and the Equal Protection Clause when it made promotion decisions based upon the race of the person to be promoted. To place the City's use of race in promoting candidates under the consent decree in context, we first review the pertinent events that led to the consent decree and brought us to this stage of the litigation.

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[1] We affirm without discussion the district court's holding that § 108 of the Civil Rights Act of 1991 is inapplicable because the conditions for application of that section, even if retroactive application is appropriate, are not present in this case.

[2] The engineering department employee has been included among the Appellants since the original trial of Appellants' case is 1985. No material aspect of the claims relating to the engineering department is discussed in the district court opinion that is the subject of this appeal. We will, therefore, confine our analysis to the claims raised regarding the BFRS. On remand, the district court should apply our analysis and holdings to all Plaintiffs with pending claims.

A. *Events Leading to the Consent Decree*

In the mid-1970s, the United States, the Ensley Branch of the NAACP, and seven black individuals (Martin plaintiffs) sued the City and the Personnel Board of Jefferson County (Board) in three separate class actions. The suits charged that the City and the Board had unlawfully discriminated against blacks and women in their hiring and promotion decisions.[3] The district court consolidated the three original cases and held two trials. The first trial, in 1976, was held on the limited issue of the validity of the Board's screening tests for entry-level police and firefighter applicants. The district court found that the tests violated Title VII and ordered the Board to certify a number of black applicants for employment with the City. *In re Birmingham Reverse Discrimination Employment Litig.*, 833 F.2d 1492, 1494 & n. 4 (11th Cir. 1987), *aff'd sub nom. Martin v. Wilks*, 490 U.S. 755, 109 S.Ct. 2180, 104 L.Ed.2d 835 (1989) (*BRDEL I*). In 1979, the district court held a second trial on the validity of other testing and screening devices used by the Board. *Id.*

While awaiting the outcome of the second trial, the parties entered settlement negotiations. Eventually, two consent decrees resulted, one between the plaintiffs and the Board and the other between the plaintiffs and the City. The City's negotiation process was not without its puzzling aspects. As in any negotiation, the City and the United States exchanged proposals several times. The City initially proposed for itself a fixed quote of 35% across-the-board black appointments to all job openings in the City for five years. The United States, the party pressing the discrimination claim against the City, countered with a proposal that addressed certain job categories individually. With

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[3] The Board and the City share responsibility for hiring and promoting City employees. The Board administers tests, tracks employee seniority points, and develops lists of certified candidates for various job openings within City government. When a job opening occurs, the Board certifies candidates it deems qualified for the position to the City and the appropriate City official selects a candidate from the Board-certified list. See *infra* part I.D.

respect to BFRS promotions, the United States' response set a lower standard than that initially proposed by the City for promotions of blacks to the lieutenant ranks; it proposed promoting blacks from entry-level firefighter to fire lieutenant at a rate equal to two times the percentage of blacks in the entry level position.[4] That is, because at that time blacks comprised 9% of entry-level firefighters, blacks would receive 18%, not the City's proposed 35%, of all promotions to fire lieutenant. In response, the City accepted the two-times-representation language, but added for itself a more stringent minimum requirement of 25% black promotions in all job categories, regardless of black representation in the job classification immediately below the promotional job. Under the City's counter-proposal, then, blacks would receive 25% rather than the United States' proposed 18%, of all promotions to fire lieutenant.

After additional negotiation and cross-submission of draft decrees, the City's attorneys presented a settlement proposal to the Birmingham City Council for approval.[5] The decree as it read when presented to the City Council set a long-term

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[4] Throughout this opinion, we refer to the pyramid-type hierarchy of the BFRS as follows: firefighter is the entry-level position within the department; fire lieutenant is the first significant promotion level to which a firefighter might aspire; fire captain is the next promotion following service as a fire lieutenant; battalion chief is the position to which a fire captain might be promoted; and fire chief is the top office within the BFRS. We mean by the terms firefighter only those BFRS employees occupying entry-level positions. Firefighter does not include fire lieutenants, captain, and battalion chiefs.

[5] Testimony indicates that the Mayor called the City Council to a special meeting the day before its regularly scheduled meeting to hear a presentation by attorneys for the City regarding a proposed settlement. It is unclear from the record whether Council members were given copies of the draft consent decree at that meeting. It is clear that two City attorneys involved in the litigation and settlement negotiations discussed the general terms of the decree with the Council and recommended settlement as the preferred course over continuing to defend the City's record regarding employment opportunities for blacks and women.

objective for the City to employ blacks in all jobs within the City in proportion to the representation of blacks in the surrounding Jefferson County labor market, which was 28% at the time. There was no fixed annual percentage of black promotions to fire lieutenant. Instead, the decree presented to the City Council mandated that two of the next four lieutenant promotions would be filled by blacks; thereafter, the City would promote blacks to lieutenant at two times the rate of black representation among firefighters.[6] The decree as presented also provided for back pay relief in an unspecified amount to individuals who were the victims of alleged past employment discrimination by the City.[7] The City Council passed Resolution

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[6] In 1981, when the decree was negotiated, approximately 9% of BFRS firefighters were black. This provision, therefore, meant that approximately 18% of annual promotions to lieutenant would be filled by blacks. The decree, however, also contained provisions designed to increase the number of black firefighters hired by the City. Therefore, as the percentage of black firefighters increased, the percentage of lieutenant promotions annually reserved for blacks would also increase.

[7] The record regarding back pay relief is somewhat confusing. At one stage in the negotiations, the United States was demanding that the City pay $500,000 in back pay relief to alleged victims of discrimination. The final decree provides for payment of $265,000 to settle all claims against the City. Whether the total amount of back pay relief to be provided by the City had been agreed upon when the decree was presented to the City Council is uncertain. Defense exhibit 39, the draft of the decree as itstood when the City Council met, contains a provision that "[t]he City agrees to pay the sum of $_____ in full and complete settlement of the claims against the City of Birmingham for monetary relief of the blacks identified on Appendices __ and __ of this Decree." The Appellees maintain that attorneys for the City told the City Council that $265,000 would be paid to settle the claims.

James Baker, City Attorney when the decree was entered, testified at the 1991 trial. Baker's testimony indicates that the City Council approved a settlement sum of $265,000 when it passed Resolution 547-81. Baker testified on cross examination as follows:

> Q. And you prepared Resolution 547 which authorized entry into the consent decree?
>
> A. Yes, sir.
>
> Q. And did Resolution 547 talk about the amount of money or just the entry into the decree?

547-81 at its regular meeting the following day, authorizing entry into the consent decree.

Resolution 547-81 notes that the parties had reached substantial agreement on the content of a consent decree designed to end the pending litigation. As we read the resolution, it authorized the City Attorney, with approval of the Mayor, to enter into a decree "embodying such terms" as those that were presented to the Council. Following passage of Resolution 547-81, negotiations continued and produced the final version of the decree, which was subsequently approved by the district court and is still in effect today.[8]

In the final decree the City did not admit to "any violation of law, executive order or regulation," but adopted the following plan to remedy past underrepresentation of blacks and women in City employment:

> In order to correct the effects of any underrepresentation of blacks and women in the City's workforce caused by any alleged prior discriminatory employment practices, the City agrees to adopt as a long term goal, subject to the availability of qualified applicants, the employment of

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> A. My recollection is that——let me look at it and discuss the money because *the City would not have been able to settle this case without council approving that sum of money being paid.*
> Q. Well, *not only did the council approve the sum of money* but the council approved entry into the decree by Resolution 547?
> A. *It did. Yes.*

(Emphasis added.) Resolution 547-81, however, contains no reference to any sum of money to be appropriated for settlement. It simply authorizes the City Attorney, following consultation with the Mayor, to enter into a consent decree to settle pending litigation. We are unable to tell at what point the parties reached agreement on a dollar figure to settle outstanding claims. It is clear that no figure was approved in Resolution 547-81 and that the City desired to keep its financial obligations to a minimum.

[8] Certain aspects of the decree were modified by the district court in 1991. An appeal from the modification order is before another panel of this Court. *See Birmingham Firefighters v. Seibels*, 11th Cir. 1994, ___ F.3d ___ (No. 91-7799).

> blacks and women in each job classification in each department of the City of Birmingham in percentages which approximate their respective percentages in the civilian labor force of Jefferson County as defined by the 1970 Federal Census.

Decree ¶ 5. The final decree also set a specific annual percentage for black promotions to fire lieutenant different from the one contained in the version presented to the City Council. Instead of setting black fire lieutenant promotions at two times the percentage of black firefighters, the final decree establishes that, each year, 50% of all promotions to lieutenant in the BFRS will be filled by qualified blacks. Decree ¶ 6. Under the decree, for every two lieutenant positions that come open, one must be filled by a black candidate, as long as there are qualified black applicants.[9]

[1] The decree contains no termination date. Rather, it provides that the district court will retain jurisdiction over the decree and that, after the decree operates for a minimum of six years, any party may move to modify or dissolve it.[10]

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[9] The decree also provides that, subject to the availability of qualified black candidates, at least one of the next two captain vacancies in the BFRS would be filled by a black, with subsequent captain and battalion chief openings filled at the rate of two times the percentage representation of blacks in the job category from which captains and battalion chiefs are usually drawn. Decree ¶ 8. It is unclear exactly how this provision was intended to work given that, at the time the decree was entered, there were no black lieutenants from which to select a black captain. Another provision of the decree, however, provides some insight. "Employees who have obtained permanent status as fire lieutenant or fire captain shall not be deemed ineligible for promotion to the next higher rank based upon any minimum length of service or time in rank." Decree ¶ 19b. This allows black firefighters to progress rapidly through the ranks of lieutenant and captain to battalion chief.

[10] A district court need not await a party's motion to terminate a consent decree over which the court retains supervisory jurisdiction. When the remedy prescribed in the consent decree is accomplished, the district court may *sue sponte* terminate the decree. *United States v. City of Miami*, 2 F.3d 1497, 1506 (11th Cir. 1993). The district court has not yet acted to

Before giving its final approval to the decree, the district court held a hearing to consider objections of interested parties. *BRDEL I*, 833 F.2d at 1494. The Birmingham Firefighters Association filed objections and, along with two of its members, moved to intervene as of right in each of the three pending cases, contending that the proposed decree would adversely affect members' rights. *Id.* at 1495. The district court denied the motion to intervene and, on August 18, 1981, approved the decree. *Id.* The City has promoted fire lieutenants in the manner prescribed by the final decree since that time. *See infra* part 1.D.

Following denial of the motion to intervene, seven non-black male firefighters sought a preliminary injunction to enjoin operation of the decree, asserting that the promotion provisions would discriminated against them based upon their race, in violation of Title VII. The district court denied the injunction. The district court's refusal to permit intervention and its denial of the application for a preliminary injunction were consolidated on appeal to this Court. *Id.* We affirmed the denial of injunctive relief and dismissed the appeal of the denial of intervention, noting that the complaining firefighters would not be prejudiced by that denial because they could file a separate Title VII action against the City to address whatever harm they might suffer as a result of the operation of the decree. *United States v. Jefferson County*, 720 F.2d 1511 (11th Cir. 1983).

B. *Post-decree History*

The non-black male firefighters then brought suit in the district court against the City and the Board, under both the Equal Protection Clause and Title VII, charging reverse discrimination. They asserted that they were being denied promotions because of their race and that the City was promoting allegedly less qualified black firefighters to lieutenant solely on the basis of race, while claiming the City and Board consent decrees protected its actions from scrutiny.

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terminate the City decree.

BRDEL 1, 833 F.2d at 1495. The City and the Board admitted making "numerous race conscious promotion and employment decisions pursuant to [the City decree's] terms." *Id.* at 1496 (alteration in original). They contended that the plaintiffs, although not signatories, were bound by the City and Board decrees and that the promotions in question were lawful because they were made pursuant to the decrees. *Id.*

In *BRDEL 1* we noted that, when the nonblack firefighters' claims were tried in 1985, the district court "treated the plaintiffs as if they were bound by the consent decrees and as if they were alleging solely that the City had violated [the terms of] the City decree." *Id.* As a result, the district court focused on whether the City had violated paragraph 2 of the decree, which provided that nothing in the decree required the City to promote a person who was less qualified "in preference to a person who is demonstrably better qualified based upon the results of a job related selection procedure." *Id.* at 1497. The issue tried in 1985 thus was whether the City had complied with the terms of the decree, not the legality of the consent decree itself.

The district court found that the City did not use a job related selection procedure to evaluate candidates referred to it by the Board and that it had made no effort to develop any such procedure. *Id.* On appeal, we noted that this finding prevented plaintiffs from establishing a violation of paragraph 2: "since the City did not use a job-related selection procedure, the court apparently reasoned, paragraph 2 imposed no obligations on it." *Id.* We held that the district court erred in finding the individual plaintiffs bound by the consent decree and remanded the case for trial on the merits of the claims of unlawful discrimination under Title VII and the Equal Protection Clause. *Id.* The Supreme Court affirmed. *Martin v. Wilks*, 490 U.S. 755, 109 S.Ct. 2180, 104 L.Ed.2d 835 (1989). Thus, in 1991, more than ten years after the City consent decree was entered, the district court held a trial on the Appellants' claim that the City's use of race when making promotions in the BFRS violated both Title VII and the Equal Protection Clause.

C. *The 1991 Trial*

In *BRDEL 1*, we perceived "no reason for treating a consent decree entered pursuant to a voluntary settlement differently from a voluntary affirmative action plan" and rejected "any notion that the memorialization of that voluntary undertaking in the form of a consent decree somehow provides the employer with extra protection against charges of illegal discrimination." *BRDEL 1*, 833 F.2d at 1501 (footnote omitted).[11] We therefore instructed the district court on remand to treat the consent decree as a voluntary affirmative action plan and evaluate it under Title VII, using the analysis articulated in *Johnson v. Transportation Agency*, 480 U.S. 616, 107 S.Ct. 1442, 94 L.Ed.2d 615 (1987), and under the Equal Protection Clause using the analysis of *Wygnant v. Jackson Board of Education*, 476 U.S. 267, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986). *Id.* at 1501 & N. 23.

Noting that this case involved race-based employment decisions made by a government employer, the district court recognized that it should apply a strict scrutiny review to the decree. *Bennett v. Arrington*, 806 F.Supp. 926, 928 (N.D. Ala. 1992); *See City of Richmond v. J.A. Crown Co*, 488 U.S. 469, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989); *Peightal v. Metropolitan Dade County*, 940 F.2d 1394, 1399 (11th Cir. 1991) ("In Croson, a majority of the Court finally agreed that the constitutionality of a state or local public minority preference program must satisfy a strict scrutiny standard."), *cert. denied*, ___ U.S. ___, 112 S.Ct. 969, 117 L.Ed.2d 134

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[11] *See also Local Number 93 v. City of Cleveland*, 478 U.S. 501, 515, 106 S.Ct. 3063, 3072, 92 L.Ed.2d 405 (1986) (finding, for purposes of Title VII analysis, no need to distinguish between an employer's actions taken pursuant to a consent decree and voluntary action taken outside the litigation context); *but see United States v. Paradise*, 480 U.S. 149, 193-195, 107 S.Ct. 1053, 1078-79, 94 L.Ed.2d 203 (1987) (Stevens, T. concurring) (comparing the presumption against race-conscious decisionmaking a government must overcome when fashioning an affirmative action plan with the duty that a district court has to fashion a race-conscious remedy after finding a government guilty of racial discrimination and suggesting greater deference to the court-ordered remedy).

(1992). The district court found that the City was justified in entering the decree because it had a strong basis in evidence for believing that it had discriminated against minorities in the past. *Bennett*, 806 F.Supp. at 928-29. The district court further found that the City's use of race under the decree was "limited and tailored to the relief necessary to overcome the employment effects of past discrimination by the city," while placing an "acceptable burden" on third parties like the Appellants. *Id.* at 929, 931. Accordingly, it denied the Appellants' claims. *Id.* at 931.

The district court did not separately evaluate Appellants' Title VII and Equal Protection Clause claims. Rather, it analyzed the City decree using the approval announced in *Johnson*, a Title VII case, and applied that analysis to all claims raised. We have previously recognized the struggle that district courts face in extracting guidance from the various multi-part Supreme Court opinions on the constitutionality of voluntary, government-sponsored affirmative action programs developed in various contexts. *See Peightal*, 940 F.2d at 1399 (noting the diversity of views expressed in Supreme Court, opinions leading up to *Croson*).[12] We believe, however, that in the interest of clarity our analysis must separately address Appellants' Title VII and Equal Protection claims. In order to assist our analysis, we first describe in greater detail the way in which the City uses race to determine candidates for promotion under the consent decree. Our understanding of the operation of the consent decree is informed by the City's brief on appeal and by

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[12] *See also* Mary C. Daly, *Some Runs, Some Hits, Some Errors——Keeping Score in the Affirmative Action Ballpark from Weber to Johnson*, 30 B.C.L.Rev. 1 (1988). Daly describes the opinions in the nine Supreme Court affirmative action cases preceding *Croson* as "lengthy, incohesive, contradictory and ambiguous . . . occupy[ing] over five hundred fifty-four pages in the official reporters and consist[ing] of forty-six majority, plurality, concurring and dissenting opinions." *Id.* at 5. Daly notes further that "[e]ven within a single case, it is often impossible to discern the Court's holding because not every Justice in the majority will endorse the entire majority opinion" and frequently no majority opinion was produced at all. *Id.*

the district court's findings of fact and conclusions of law entered at the close of the first trial on the Appellants' claims in 1985. *See In re Birmingham Reverse Discrimination Employment Litig.*, 39 Fair Empl. Prac. Cas. (BNA) 1431, 1985 WL 56690 (N.D.Ala. 1965).

D. *Operation of the City Decree*

When a City department has a vacancy in a job classification to be filled by promotion, it sends a "request for certification" of promotional candidates to the Board. *Id.* at 1438, ¶ 27. The City's personnel office review the request to determine whether the department is in compliance with the City's affirmative action plan. *Id.* If the department is not in compliance, the request is stamped with a notation indicating that the City requests that the Board certify qualified blacks (or females) for the open position. *Id.*

The Board administers written promotional examinations and trades employee seniority in City jobs. *Id.* ¶ 25. It grades promotional examinations, establishes a passing score, and calculated a converted score on a standardized scale for persons who pass an exam. *Id.* The Board then adds one point to each employee's converted score for each year of service with the City, up to a maximum of twenty years' service, to determine a final score. Employees of all races are then ranked on a single eligible register according to their final score. *Id.*[13]

The Board follows a "rule of three" when it supplies the City with names of candidates for promotional openings, providing a number of candidates equal to the number of openings plus two. *Id.* 27[14] That is, if there is one opening, the Board provides three names; if there are four openings, the

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[13] This necessarily means that an employee with less seniority must have a higher converted score than a more senior employee in order to attain a higher final score and a higher ranking on the eligible register.

[14] The "rule of three" was in effect at all times pertinent to this appeal.

Board provides six names. If the City indicates on the request for certification that blacks are needed to meet the requirements of the decree, the Board reviews the eligible register and provides the necessary number of names on separate lists of black and non-black eligible candidates. Black candidates and non-black candidates are listed separately in the order in which they are ranked on the eligible register. *Id.* at 1437-38, ¶¶ 17, 27. For example, if the Board supplies names of four blacks and four non-blacks for promotional openings, the black list contains the four highest-ranked blacks on the eligible register and the non-black list contained the four highest-ranked non-blacks on the eligible register, regardless of how high or low they actually rank in the register relative to each other.

When the black and non-black candidate lists arrive in the BFRS, the Chief reviews the personnel files of the certified individuals and consults with the deputy chief about the candidates to determine whether any candidates are unqualified. *Id.* at 1437, ¶ 16. The Chief does not compare the relative qualifications of black and non-black candidates for promotion prior to making his selection from the lists. Nor does he compare the relative qualifications of the individuals certified as eligible against others of the same race certified on the same list. *Id.* This is because he believe he must provide the highest ranked individual on each list unless he can "prove that the highest ranked individual of either race is unqualified for the promotional position." *Id.* at 1437-38, ¶ 18. Therefore, he typically promotes in the order in which candidates appear on the respective lists. *Id.* at 1437, ¶ 16. The Chief alternatives selections between the top name on the black list and the top name on the non-black list until all available openings are filled. *Id.* at 17.[15]

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[15] This method was employed by the BFRS from the inception of the consent decree through 1988. In 1988, the BFRS began to use internal review panels to interview and evaluate the promotion candidates certified as eligible by the Board. This review panel system is not relevant to our inquiry because the City's actions about which Appellants here complain occurred before 1988 under the system described above.

Under this system, then, employees who will eventually fill an opening in the BFRS are pre-selected by race. If four fire lieutenant positions are open, two of those will be filled by blacks and two by non-blacks. Among employees certified by the Board as eligible candidates, promotions are awarded solely by race. No black employee ever competes for the two openings designated in advance to be filled by non-blacks. No non-black employee can compete for the two openings designated for blacks.

The impact of this system on the Appellants was such that, in the words of the district court:

> Each of the plaintiffs who complains in this litigation against the failure to be appointed as a fire lieutenant or fire captain or civil engineer[,] or who claims that he was delayed in such an appointment[,] was adversely affected because he was white. Those persons[,] in the absence of the consent decree and in the absence of any affirmative action plan adopted by the City as mandated by the decree would, as I interpret the evidence, have been appointed to the positions they desired and about which they here complain. Each of those individuals ranked higher on the certification list provided by the Personnel Board than the blacks who were appointed by the City pursuant to the consent decree.

Id. at 1433. Thus, the question we must determine here is whether an affirmative action plus that continuously segregates employees in this manner, and has the above-described impact on the promotional opportunities of employees who are not beneficiaries of its provisions, is permissible under both Title VII and the Equal Protection Clause.

II. Method of Analysis

The Supreme Court established in *Croson* that strict scrutiny is the standard of review to be applied to all claims of race-based discrimination by state government entities, regardless of the race of the complaining party. 488 U.S. at 493, 518-21, 109 S.Ct. at 722, 735-36. Accordingly, we apply strict scrutiny to

the claims before us. Our analysis of the Appellants' claims, however, does not begin and end with *Croson*. Although informing our analysis, *Croson* did not present a Title VII claim for review. Second, *Croson* did not involve race-based decisions made by a state governmental entity attempting to remedy its own history of prior employment discrimination.[16] Indeed, *Johnson*, a Title VII case, is more analogous to this case in some respects. *Johnson* notes that the obligations of a public employer under Title VII and the Constitution are not identical. 480 U.S. at 628 n. 6, 107 S.Ct. at 1449 n. 6 ("The fact that a public employer must also satisfy the Constitution does not negate the fact that the *statutory* prohibition with which that employer must contend was not intended to extend as far as that of the Constitution."); *id.*, 480 U.S. at 632, 107 S.Ct. at 1452 ("[W]e do not regard as identical the constraints of Title VII and the Federal Constitution on voluntarily adopted affirmative action plans.") Because this case presents both Title VII and Equal Protection claims, we must reconcile the case law developed in both areas with the direction a divided Supreme Court provided in *Croson*. To maintain clarity, we separately consider the City decree under both Title VII and the Equal Protection Clause.

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[16] In *Croson*, a city attempted to remedy alleged discrimination in the construction industry by establishing minority business subcontractor set-asides for general contractors building on city construction projects. 488 U.S. at 476, 109 S.Ct. at 713. The city was not attempting to develop a remedy for its own past discrimination. *Id.* at 497, 109 S.Ct. at 724. This case, however, involves a city attempting to remedy under-representation of blacks and women that, the district court found, arose from the City's own previous discriminatory employment practices, the evidence of which was before the City when it acted.

III. Title VII Claim

[2-4] Title VII reads in pertinent part: (a) It shall be unlawful employment practice for an employer—

> (1) to fail or refuse to hire . . . or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race . . .; or
>
> (2) to . . . classify his employees . . . in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race . . . .

42 U.S.C. § 2000e-2. It is now well established that employers may develop affirmative action plans designed to "further[] Title VII's purpose of eliminating the effects of discrimination in the workplace." *Johnson*, 480 U.S. at 630, 107 S.Ct. at 1451.[17] An employer's decision to account for race in an affirmative action plan is "consistent with Title VII's objective of break[ing] down old patterns of racial segregation and hierarchy." *Id.* at 628, 107 S.Ct. at 1450. Yet, an employer implementing a race-conscious affirmative action plan must assure that race will be considered "consistent with Title VII's purpose . . . and that the interests of those employees not benefiting from the plan will not be unduly infringed." *Id.* at 632, 107 S.Ct. at 1452.

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[17] *See also United Steelworkers v. Weber*, 443 U.S. 193, 204, 99 S.Ct. 2721, 2728, 61 L.Ed.2d 480 (1979) (observing, in a case involving a private employer, that "[i]t would be ironic indeed if a law triggered by a Nation's concerns over centuries of racial injustice and intended to improve the lot of those who had been excluded from the American dream for so long, constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy") (citation omitted); *id.* at 200, 99 S.Ct. at 2726 (noting the "'familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers'" (quoting *Holy Trinity Church v. United States*, 143 U.S. 457, 459, 12 S.Ct. 511, 512, 36 L.Ed. 226 (1892)).

[5, 6] Determining whether the affirmative action plan embodied in the City decree was implemented consistent with Title VII's purpose and without unduly infringing the interests of Appellants involves a two-part test. We must first determine whether the City's consideration of the race of promotional candidates was justified by a manifest racial imbalance that reflected under-representation of blacks in traditionally segregated job categories. *Id.* If such a justification was present when the plan was developed, we must then determine whether the plan itself provides a proper remedy for that imbalance. A remedy is proper if the plan does not unnecessarily trammel the rights of non-black employees or create an absolute bar to their advancement. *Id.* at 637, 107 S.Ct. at 1455.

A. *Justification—Manifest Racial Imbalance*

[7] When a job requires no special expertise, determining whether a manifest imbalance exists that would justify race-conscious decisionmaking by the employer involves a comparison of the percentage of minority employees in that job with the percentage of minorities in the general area labor market. *Id.* at 632, 107 S.Ct. at 1452. When a job requires special skills or training, however, the appropriate comparison is to those in the labor market who possess that special skill or training. *Id.; see also United States v. City of Miami*, 2 F.3d 1497, 1509 (11th Cir.1993) ("It is well established that, in determining whether there is a work force imbalance that justifies affirmative action remedies, the proper comparison is between the minority composition of the work force in question and the *qualified* minority population in the relevant labor market.").

[8] This case presents for review those aspects of the City plan relating to promotions of firefighters to fire lieutenant in the BFRS. Training and experience as a firefighter are special skills required of those who would become fire lieutenants. As such, to determine if an imbalance existed that would justify race-conscious promotion decisions by the City, the appropriate

comparison is between black representation in the BFRS lieutenant ranks and black representation among entry-level firefighters. *See Stuart v. Roache*, 951 F.2d 446, 450-51 (1st Cir.1991) (comparing percentage of minorities in sergeant rank with percentage of minorities in the rank immediately below having years of service necessary to become sergeants), *cert. denied*, ___ U.S. _____, 112 S.Ct. 1948, 118 L.Ed.2d 553 (1992).[18]

This comparison is consistent with the comparison used in *Johnson*, where the Supreme Court addressed a Title VII challenge to an affirmative action plan developed by a county transportation agency (agency). Johnson, a male, brought suit after Joyce, a female, was promoted to road dispatcher instead of him. Joyce and Johnson were among seven applicants certified as eligible for selection after the initial round of applicant interviews. Three agency supervisors conducted a second round of interviews and recommended Johnson for the position. The agency's affirmative action coordinator, however, acting under a duty to keep the agency's director informed of opportunities for the agency to accomplish its objectives under its affirmative action plan, recommended to the director that Joyce be promoted. The director heeded the coordinator's recommendation and selected Joyce over Johnson.

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[18] We address only the proportion provisions of the City plan in this appeal. Promotions, by their very nature, involve elevating a current employee to a higher position. Status as a department employee, therefore, is a prerequisite to promotion within a City department. Simply put, an employee must first be a firefighter before becoming a fire lieutenant, a fire lieutenant before becoming a captain, and so forth.

Under the terms of the decree, the City cannot require a firefighter to serve longer than two years in that position before becoming eligible to take a promotional exam for fire lieutenant. Decree ¶ 19b. Further, the decree specifically removes all length of service and time-in-grade requirements for promotions to captain or above. *Id.* So, fire lieutenants promoted under the decree must have a minimum of two years' experience as a firefighter, but there is no minimum experience as a lieutenant required to become a captain, or as a captain in order to become a battalion chief.

The agency in *Johnson* had developed an affirmative action plan that authorized it to consider as one factor the sex of a qualified applicant when making promotions with a traditionally segregated job classification where women were significantly under-represented. The agency adopted its plan believing "mere prohibition of discriminatory practices is not enough to remedy the effects of past practices and to permit attainment of an equitable representation of minorities, women and handicapped persons" in the agency's work force. *Johnson*, 480 U.S. at 620, 107 S.Ct. at 1446.

The Supreme Court observed without comment that the agency plan adopted as a long-term objective achieving an agency workforce that mirrored in each major job classification the percentage of women in the area labor market. *Id.* at 633, 107 S.Ct. at 1453. "Even as it did so, however, the Agency acknowledged that such a figure could not by itself necessarily justify taking into account the sex of applicants for positions in all job categories." *Id.* Therefore, the agency developed short-term goals for placing women in certain positions, not to be construed "as quotas that must be met, but as reasonable aspirations in correcting the imbalance in the Agency's work force." *Id.* The Court noted that the agency plan did not "dictate mere blind hiring by the numbers [or] hold supervisors to achievement of a particular percentage of minority employment . . . regardless of circumstances such as economic conditions or the number of available qualified minority applicants."[19] *Id.* Under the plan, women competed directly with all other qualified applicants: "*[n]o* persons are automatically excluded from consideration; *all* are able to have

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[19] The Court noted that the agency director testified that Joyce's sex was only one of numerous factors he considered in reaching the decision to promote her instead of Johnson. The Court likened the agency plan to the "Harvard Plan" approvingly discussed by Justice Powell in *Regents of University of California v. Bakke*, 438 U.S. 265, 315-318, 98 S.Ct. 2733, 2761-63, 57 L.Ed.2d 750 (1978) (approving consideration of an applicant's race in a college admission program as a plus in the applicant's favor while not insulating the applicant from comparison with all other candidates for admission).

their qualifications weighed against those of other applicants." *Id.* at 638, 107 S.Ct. at 1455. The plan "posed no danger that personnel decisions would be made by reflexive adherence to a numerical standard." *Id.* at 635, 107 S.Ct. at 1454.

The agency plan recognized that women were severely under-represented in the skilled craft job category, the category that included the road dispatcher position Johnson desired. In fact, there were no women among the 238 workers in that category. The Court noted that, with this type of imbalance in a category, and given the agency's desire to eliminate such imbalances, it was reasonable to consider Joyce's sex as one factor among many in the promotion decision. *Id.* at 635, 107 S.Ct. at 1454. Thus, Joyce's promotion satisfied the first element for Title VII scrutiny because it was made under an affirmative action plan designed to remove imbalances that existed in traditionally segregated job categories. *Id.* at 637, 107 S.Ct. at 1455.

[9] 1. *Findings of Manifest Racial Imbalance Required.* As a preliminary matter, we must first determine what effect the Court's opinion in *Croson* has on *Johnson's* requirement that a manifest racial imbalance must exist before a government entity can use race as a criteria in its employment decisions. Appellants assert that, in order for this Court to determine the validity of the decree and avoid the danger that its provisions were simply acts of racial politics rather than proper remedies for past discrimination, the City is required under *Croson* to have made particularized findings of its own past discrimination prior to entering the decree. Appellants maintain that when the City approved entry into the decree it made no such finding, and they claim that the lack of a formal finding of past discrimination by the City causes its decree to fail.

On the surface, Appellants' position is supported to an extent by the plain language of the decree itself. The decree, in typical settlement agreement language, specifically provides that the City admits to no "violation of law, executive order or regulations," but goes on to provide a remedy for its "alleged

prior discriminatory employment practices." In essence, the City, speaking through the decree, refuses to admit that it has discriminated in the past while setting about to remedy the discrimination its adversaries in litigation asserted to have actually occurred. Nonetheless, we believe that in these circumstances the City was not required to make formal findings about its own past discrimination—it merely had to have a strong basis in evidence, as we demonstrate below.

[10, 11] Our application of the *Johnson* manifest imbalance test here is informed by *Croson's* discussion of the necessity for a government entity to identify with specificity the discrimination it seeks to remedy through race conscious measures. *See generally Croson,* 488 U.S. at 492-505, 109 S.Ct. at 721-28. The Supreme Court has recognized that "[e]videntiary support for the conclusion that remedial action is warranted becomes crucial when the remedial program is challenged in court by nonminority employees." *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277, 106 S.Ct. 1842, 1849, 90 L.Ed.2d 260 (1986). There must be sufficient evidence to allow a trial court to "make a factual determination that the employer had a strong basis in evidence for its conclusion that remedial action was necessary." *Id.* Unless such a finding is made, an appellate court has no basis upon which to determine whether race-based action was justified as a remedy for prior discrimination by the City. *Id.*

Appellants' assertion that *Croson* requires the City to have made specific findings of its own past discrimination before entering the consent decree ignores one of the important differences between *Croson* and this case. In *Croson,* the city was not acting to remedy its own history of discrimination, but was acting to remedy discrimination it claimed had occurred in private industry. The Court found the city council's justifications for the use of race to be "an amorphous claim that there has been past discrimination in a particular industry [that] cannot justify the use of an unyielding racial quota." *Croson,* 488 U.S. at 497, 109 S.Ct. at 724. It makes a great deal of sense

to require a city to describe with particularity the findings that led it to conclude that an entire industry had engaged in discrimination before setting about to fashion a race-conscious remedy for that perceived problem. The circumstances of this case, however, do not compel a similar requirement. *See Wygant,* 476 U.S. at 289, 106 S.Ct at 1855 (O'Connor, J., concurring) ("The imposition of a requirement that public employers make findings that they have engaged in illegal discrimination before they engage in affirmative action programs would severely undermine public employers' incentive to meet voluntarily their civil rights obligations.").

[12, 13] We do not read *Croson* to require that a city settling litigation by consent decree declare *itself* to have violated the law by discriminating in employment, detailing the elements of a potential plaintiff's complaint in the process, before adopting an affirmative action plan designed to remedy the effects of its own past discrimination. *See Croson*, 488 S.Ct. at 497-505, 109 S.Ct. at 724-28; *cf. Cone Corp. v. Hillsborough County,* 908 F.2d 908, 913 (11th Cir.) (noting that the *Croson* plurality intimated that local governments could enact race-conscious remedies "to redress clear instances of discrimination"), *cert. denied* 498 U.S. 983, 111 S.Ct. 516, 112 L.Ed.2d 528 (1990). It is, however, a necessity that some finding be made that the City engaged in past discrimination, in order to allow for proper judicial review of the City's use of race in its affirmative action plan. *See Wygant,* 476 U.S. at 278 & n. 5, 106 S.Ct. at 1849 & n. 5. (if "race-based state action is taken to remedy prior discrimination by the governmental unit involved . . . the very nature of appellate review requires that a factfinder determine whether the employer was justified in instituting a remedial plan"). In this case, the necessary finding of past discrimination was provided by the district court.

In the opinion from which this appeal arises, the district court found that there was a strong basis in evidence that the City had discriminated against blacks prior to implementing the affirmative action plan embodied in the consent decree. *Bennett,*

806 F.Supp. at 929. It noted that blacks were not represented at all in the BFRS lieutenant ranks as a direct result of discriminatory testing for entry-level positions. *Id.* Further, it noted that there was a significant imbalance between the number of black lieutenants and the number of black firefighters, the jobs from which lieutenants were typically drawn. *Id.* at 930. At the conclusion of the 1985 trial, the district court found significant evidence of discrimination prior to the time the City entered into the decree. *Id.* Additional evidence presented in the 1991 trial confirmed those findings. *Id.* The district court also noted that, at the time the decree was adopted, it had already found certain tests administered by the Board to have an adverse impact on blacks and to be insufficiently job related to be valid under Title VII. *Id.* at 929. Finally, the district court found that the City entered into the consent decree only when faced with the imminence of another adverse decision by the district court related to "a further trial, with voluminous evidence, attacking scores of other tests and selection devices . . . as having a similar adverse impact and insufficient job-relatedness." *Id.* As a result, the district court found that the City was justified in using race to remedy its prior discrimination. *Id.* We conclude that these findings satisfy *Croson* and permit thorough appellate review.

[14, 15] 2. *Sufficiency of the Findings and Conclusions of Law.* We review the district court's factual findings under the clearly erroneous standard. *Newell v. Prudential Ins. Co.*, 904 F.2d 644, 649 (11th Cir.1990). The district court's legal conclusions are subject to *de novo* review. *Id.*

[16] The district court found that when the City decree was entered in 1981 there were 453 firefighters in the BFRS, 42 of whom were black. *Bennett,* 806 F.Supp. at 930 n. 6. There were also 94 lieutenants, 31 captains, and 15 battalion chiefs, none of whom were black. *Id.* Further, the district court had already found that tests administered by the Board for entry-level City jobs in both the police and fire departments were invalid under

Title VII because they had a significant adverse impact on blacks and were not sufficiently job related. *Id.* at 929 (citing *Ensley Branch, NAACP v. Seibels,* 616 F.2d 812 (5th Cir.), *cert. denied*, 449 U.S. 1061, 101 S.Ct. 783, 66 L.Ed.2d 603 (1980)). The district court found that, against this background, coupled with the advice of counsel that the likelihood of victory in the pending litigation was poor, the City was justified in adopting an affirmative action plan. The parties do not dispute these findings, and we do not hold them to be clearly erroneous.

While the Court in *Croson* criticized the findings made there for only supporting amorphous and generalized claims of societal discrimination, 488 U.S. at 498, 109 S.Ct. at 724, the findings by the district court here demonstrate that the City had strong evidence before it to believe it had engaged in past racial discrimination when it entered the consent decree. The City was aware that the district court had disapproved the hiring tests used by the Board because they had an adverse impact on blacks. The City knew, through counsel, that voluminous evidence attacking other employment tests and selection procedures had been introduced in pending litigation and was advised by counsel that settlement would be a preferred alternative to another adverse decision. The City also knew of the gross statistical disparity between the number of blacks it employed as firefighters and as officers in the BFRS. Given these facts as determined by the district court, the City was justified in implementing an affirmative action plan that provided for the use of race as a remedy for past discrimination. Therefore, the City's affirmative action plan satisfies the first element of the two-part test established in *Johnson.* We next consider whether the specific provisions of the City decree provide a proper remedy to address the identified imbalances in traditionally segregated job categories.

B. *Remedy—Unnecessarily Trammeling Rights of Non-black Employees*

[17] This element of the *Johnson* test necessarily involves balancing the use of race to secure opportunities for blacks in

traditionally segregated jobs against the impact of the plan on non-blacks. As we stated earlier, a proper remedy cannot unnecessarily trammel the rights of non-black employees or create an absolute bar to their advancement. *Johnson*, 480 U.S. at 637-638, 107 S.Ct. at 1455. On its face, the decree does not create an absolute bar to advancement for non-black employees because it sets aside a fixed percentage of promotions for blacks, leaving the remainder to be filled by all other employees. Our inquiry is thus confined to whether the decree provisions unnecessarily trammel the rights of the non-black employees who do not benefit from the plan.

Unlike the affirmative action plan approved in *Johnson,* the City decree does not use race as one factor among several that could be considered when making promotion decisions. Rather, the decree makes a Board-certified firefighter's race the sole factor used to determine eligibility for all fire lieutenant promotions in the BFRS. Promotion-eligible employees are listed separately by race and promotions are made from those separate lists to fill openings allocated by race. The decree, therefore, embodies exactly the sort of "danger that personnel decisions would be made by reflexive adherence to a numerical standard" the Court cautioned against in *Johnson.* 480 U.S. at 637, 107 S.Ct. at 1454. Unlike the plan approved in *Johnson,* in which *"[n]o* persons are automatically excluded from consideration; *all* are able to have their qualifications weighed against those of other applicants," *id.* at 638, 107 S.Ct. at 1455, the City decree specifically excludes all non-black firefighters from consideration for one-half of all fire lieutenant promotions and all black firefighters from consideration for the other half of lieutenant promotions, based solely on their race. And, unlike the plan approved in *Johnson,* the City's annual fire lieutenant promotion quota is not a "reasonable aspiration" designed to correct the imbalance in the City's workforce without unnecessarily trammeling the rights of the Appellants. It is, instead, a racial quota that must be met whenever openings occur.

[18] There is no precise formula for determining whether an affirmative action plan unnecessarily trammels the rights of non-beneficiaries. When reviewing affirmative action plans involving race based entry-level hiring goals, the Supreme Court has noted that the impact of the use of race on non-beneficiaries is diffused, spread across all those in society who might desire the entry-level position. *See, e.g., Wygant,* 476 U.S. at 281, 106 S.Ct. at 1851. Entry-level hiring goals, while burdening some innocent persons, do not impose the same type of injury on non-beneficiaries as that imposed by the use of race to determine employee layoffs. *Id.* "[L]ayoffs impose the entire burden of achieving racial equality on particular individuals, often resulting in serious disruption of their lives." *Id.* at 284, 106 S.Ct. at 1852. The Supreme Court has determined that the burden imposed through race-based layoffs is too intrusive. *Id.*

[19] This case involves neither hiring nor layoffs, but instead concerns promotions made under the City's affirmative action plan. We view the promotion situation as lying somewhere between entry-level hiring and layoffs in terms of the burden permitted on non-beneficiaries. The burden imposed by the City's plan on non-beneficiaries in the promotion context is not widely diffused like the burden imposed in a hiring situation. It resembles layoffs in that only specific persons are burdened—those who can reasonably aspire to promotions within the BFRS because they are already employed there and are qualified for promotion. When race is used under the City's affirmative action plan to determine promotions, it is the non-black employees excluded from consideration for half of all promotion opportunities, and not society in general, who bear the entire burden of the remedy for the City's past discriminatory behavior. On the other hand, failure to receive a promotion is not as serious a disruption in an employee's life as that caused by an impermissible race based layoff program. In determining whether the City's plan unnecessarily trammels the rights of non-black employees, our analysis necessarily recognizes the difference in impact between hiring, layoff, and promotion provisions in affirmative action plans.

[20] Appellees assert that no Supreme Court case dealing with affirmative action hiring and promotion goals has ever found unnecessary trammeling where the plan did not require firings or layoffs of nonminority employees. In effect, Appellees would have us read part two of the *Johnson* test to say that any affirmative action plan that does not require firings or layoffs of nonminority employees or create an absolute bar to their advancement passes scrutiny under Title VII. We are unwilling to define "unnecessary trammeling" as nothing short of firings and layoffs; an affirmative action plan can *unnecessarily* trammel the rights of nonminority employees without requiring firings or layoffs. Such is the case with the promotion provisions of the City's affirmative action plan under review here.

When the plan was created, the City employed 42 black firefighters and 411 non-black firefighters. The decree set aside half of all future promotions to fire lieutenant for those among the 42 black firefighters who became Board-certified as eligible. By virtue of the rigid manner in which the City has used race to determine promotions under the decree, *see supra* part I.D, 42 black firefighters, because of their race, gained an exclusive claim to half of all fire lieutenant promotions made under the plan, but lost any possibility of competing for the other half. On the other hand, the remaining 411 non-black firefighters saw the number of promotions to which they might aspire, absent the consideration of their race, cut from 100% to half of all lieutenant promotions. The 50% promotion quota was to continue for the duration of the decree, subject to future modification, without regard to the number of lieutenant openings in any given year, the number of black firefighters eligible to become lieutenants at any particular time, or any factor other than race. As the decree operates, no non-black firefighter can even be considered for a promotional job reserved for blacks unless no blacks remain on the Board's eligible register.

We discern no legitimate basis for the 50% figure ultimately chosen for the annual fire lieutenant promotion quota. The 50% figure selected is completely uninfluenced by the percentage

representation of blacks in the firefighter ranks, the feeder job from which lieutenant promotions are filled. The 50% figure appears entirely arbitrary, set at 50% through the settlement bargaining process after the parties failed to agree on the initially proposed 35%, or the subsequently proposed 25%, or on any other arbitrary figure that might have been proposed as the decree was developed by the attorneys for various involved parties.

In our view, the City decree fails under Title VII because the indefinitely-lasting, arbitrarily-selected 50% figure for annual black promotions to fire lieutenant unnecessarily trammels the rights of non-black firefighters by unduly restricting their promotional opportunities through establishment of an arbitrary fixed quota. Had the promotion figure been tied in some reasonable manner to the percentage of blacks in the firefighter ranks, significantly more non-black employees would have received promotions to fire lieutenant. The district court determined in 1985 that the Appellants, absent the consent decree, "would . . . have been appointed to the positions they desired and about which they here complain." 39 Fair Emp.Prac.Cas. (BNA) at 1433. The failure to be promoted, caused by the arbitrarily selected 50% promotion figure, no doubt impacted the earnings of Appellants, who are likely heavily dependent on wages for their day-to-day living. *See Wygant*, 476 U.S. at 281, 106 S.Ct. at 1851. The failure to be promoted, or even a delay in receiving a promotion, also likely impacts earnings long into the future under whatever retirement program the City provides for BFRS employees.

[21, 22] It bears repeating that this case does not involve entry-level affirmative action where the impact of race-based decisionmaking for remedial purposes is minimized as it is spread across society as a whole; we decide nothing about that kind of affirmative action. Because non-black firefighters bear the entire burden of the race-based fire lieutenant promotion remedy in the decree, and because of the immediate and future ramifications of that burden, it is imperative that the remedy be

related in some reasonable manner to the representation of blacks among firefighters. We see no such relationship in this case. We recognize that a governmental entity should take immediate steps to remedy its history of discrimination by awarding victims of that discrimination their rightfully earned promotions. *See Howard v. McLucas*, 871 F.2d 1000, 1003 & n. 5 (11th Cir.) (approving consent decree providing back pay relief and 240 promotions to black civilian Air Force Base employees into "most likely jobs lost by blacks" due to discrimination), *cert. denied* 490 U.S. 1002, 110 S.Ct. 560, 107 L.Ed.2d 555 (1989). It is not permissible, however, for a government to implement a rigid quota of race-based promotions, to continue indefinitely, with no basis at all for the quota figure selected.

Our review has located no cases approving a state government affirmative action plan where the promotion remedy was not tied in some manner to the representation of minorities in the pool of candidates for promotion. *See, e.g., Wilson v. Bailey*, 934 F.2d 301, 303 (11th Cir.1991) (approving, in a case involving some of the same parties present in this litigation, use of race as one factor among many considered when consent decree called for promotion of blacks and females to certain jobs at rates "at least equivalent to their percentage representation in the applicant pool from which such promotions are made"); *Davis v. City of San Francisco*, 890 F.2d 1438, 1449 (9th Cir.1989) (approving consent decree providing preferential promotions for minorities based on the percentage of minorities in the relevant labor force), *cert. denied* 498 U.S. 897, 111 S.Ct. 248, 112 L.Ed.2d 206 (1990). Indeed, within the City decree itself there are examples of promotion provisions that are tied to the representation of blacks in the feeder job category. There is no legitimate reason for the annual fire lieutenant promotion figure to be completely unrelated to the population of black firefighters.

Promotional remedies for past discrimination using percentages not tied to the percentage of minorities in the job immediately below the promotion position have withstood scrutiny only when ordered by a court to combat a state

government's steadfast refusal to obey that court's long-standing order to develop non-discriminatory promotion procedures. *See United States v. Paradise*, 480 U.S. 149, 163, 107 S.Ct. 1053, 1063, 94 L.Ed.2d 203 (1987) (upholding district court order mandating 50% black representation in next group to be promoted to state trooper corporal to provide relief for state's failure to develop acceptable promotion procedures eleven years after first ordered to do so by the district court). This, however, is not a case like *Paradise*, where the district court ordered a remedy to combat an egregious refusal to follow its prior orders to end discriminatory practices. This is a case where, to end pending litigation, the City voluntarily entered into a consent decree containing a quota-based affirmative action plan that cannot withstand scrutiny.

We hold that the fire lieutenant promotion provision of the City's affirmative action plan violates Title VII because it unnecessarily trammels the rights of non-black firefighters by establishing a rigid, arbitrarily selected quota of 50% annual black promotions to fire lieutenant.

IV. Equal Protection Clause Claim

We turn next to Appellants' Equal Protection Clause challenge to the City's affirmative action plan. Appellants assert that they were denied promotions to fire lieutenant because of their race in violation of the Equal Protection Clause.[20] Appellees maintain that the use of race in determining fire lieutenant promotions should survive an equal protection challenge because the City had a compelling interest in adopting the decree and the provisions of the decree are narrowly tailored to achieve that interest.

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[20] The Equal Protection Clause provides, in relevant part, that "[n]o State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

[23, 24] "'Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination.'" *Wygant*, 476 U.S. at 273, 106 S.Ct. at 1846 (quoting *Bakke*, 438 U.S. at 291, 98 S.Ct. at 2748). This strict scrutiny is employed even though the racial classification challenged operates against a group not historically subject to discrimination by government. *Id.; see also Croson*, 488 U.S. at 494, 109 S.Ct. at 722 ("We thus reaffirm the view . . . that the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification."). To assure a proper balance between the individual rights secured by the Fourteenth Amendment and the permissible burden placed on innocent persons, the use of race in government decisionmaking is subject to strict judicial scrutiny "to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool." *Croson*, 488 U.S. at 493, 109 S.Ct. at 721.

[25, 26] To survive a challenge under the Equal Protection Clause, the City's use of race in making fire lieutenant promotion decisions must be justified by a compelling interest and must be narrowly tailored to achieve that interest. *See Wygant*, 476 U.S. at 274, 106 S.Ct. at 1847; *Cone Corp.*, 908 F.2d at 913 ("Under strict scrutiny analysis, the racial classifications must be necessary and must be narrowly tailored to achieve the goal of remedying the effects of past discrimination."). The City must show that a compelling governmental purpose justified the use of a racial preference and that the means chosen—in this case, the selection of candidates for promotions solely because of their race—was narrowly tailored to achieve that purpose. *See Hayes v. North State Law Enforcement Officer Ass'n*, 10 F.3d 207, 212-13 (4th Cir.1993). For the reasons set forth below, we hold that the City had a compelling interest in providing a remedy for its prior discriminatory employment practices, but that the City's use of race in its affirmative action plan is not narrowly tailored to

achieve that interest as required under the Equal Protection Clause.

A. *Compelling Government Interest*

[27-29] Public employers operate under a clear command from the Supreme Court to eliminate the vestiges of prior racial segregation and discrimination. *Wygant*, 476 U.S. at 276, 106 S.Ct. at 1848. At the same time, public employers must "'do away with all governmentally imposed discriminations based on race.'" *Id.* (quoting *Palmore v. Sidoti*, 466 U.S. 429, 430-33, 104 S.Ct. 1879, 1881-82, 80 L.Ed.2d 421 (1984)). The Supreme Court has noted that these two commands must be reconciled with great care, because they are not always harmonious. *Id.* That is, while attempting to eliminate the vestiges of past discrimination against persons of one race, government must minimize the imposition of new discriminations on persons of other races. Therefore, the Court requires a showing that the governmental unit involved engaged in prior discrimination, and requires a strong basis in evidence that remedial action is warranted, before allowing that governmental unit to execute an affirmative action plan remedying prior discrimination by using race in a narrowly tailored manner. *Croson*, 488 U.S. at 499, 190 S.Ct. at 725.

[30] As an initial matter, then, we must decide whether there was a strong basis in evidence that remedial action was warranted before the City entered the consent decree embodying its affirmative action plan.[21] As noted previously, the district court found strong evidence that the City had engaged in prior discrimination in the BFRS. *See supra* part III.A.2. We accept the district court's findings and will not repeat them here. We also accept the district court's findings and conclusion that

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[21] We discussed above and rejected Appellants' assertion that, under *Croson*, the City was required to articulate specific findings of its past discrimination before entering the consent decree. *See supra* part III.A.1.

action to remedy the effects of prior discrimination in the BFRS was warranted. But even when a city is justified in implementing an affirmative action plan, only a plan that is "carefully constructed" will do. *See Wygant*, 476 U.S. at 286, 106 S.Ct. at 1853 (O'Connor, J., concurring) ("The Court is in agreement that . . . remedying past or present racial discrimination by a state actor is a sufficiently weighty state interest to warrant the remedial use of a carefully constructed affirmative action program.").

B. *Narrowly Tailored Means*

[31, 32] Classifications based upon race carry a very real danger of harm because they "threaten to stigmatize individuals by reason of their membership in a racial group." *Shaw v. Reno*, ___ U.S. ____, ____, 113 S.Ct. 2816, 2824, 125 L.Ed.2d 511 (1993). "[E]ven in the pursuit of remedial objectives, an explicit policy of assignment by race may serve to stimulate our society's latent race consciousness, suggesting the utility and propriety of basing decisions on a factor that ideally bears no relationship to an individual's worth or needs." *United Jewish Orgs., Inc. v. Carey*, 430 U.S. 144, 173, 97 S.Ct. 996, 1014, 51 L.Ed.2d 2029 (1977) (Brennan, J., concurring in part and dissenting in part). Preferences based on race "may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth." *Bakke*, 438 U.S. at 298, 98 S.Ct., at 2752. As a result, a race conscious government policy justified by a compelling purpose—remedying past racial discrimination—must also use race in as limited a manner as possible to accomplish that compelling purpose.

[33] Several factors determine whether race-based promotional relief is narrowly tailored to accomplish a compelling purpose, including: "the necessity for the relief and the efficacy of alternative remedies, the flexibility and duration of the relief, including the availability of waiver provisions, the relationship of numerical goals to the relevant labor market, and

the impact of the relief on the rights of [the Appellants]." *Howard v. McLucas*, 871 F.2d 1000, 1008 (11th Cir.) (internal quotations omitted), *cert. denied*, 493 U.S. 1002, 110 S.Ct. 560, 107 L.Ed.2d 555 (1989). We address each of these in turn.

[34] 1. *Necessity for the Relief Granted and Efficacy of Alternative Remedies.* In *Howard*, we explored in detail the provisions of a consent decree using race to provide relief to victims of past discrimination by a government employer. The consent decree provided promotions for 240 specified plaintiffs who likely were previously denied promotions because of their race. The decree identified 38 target positions, based upon historical career progression patterns, to determine the jobs most likely lost by the plaintiffs and limited the race-conscious promotions to those positions. *Id.* at 1003. The 240 discrimination victims were listed on special promotion registers and alternated with persons on a general promotion register to fill openings as they occurred in each of the 38 target positions. *Id.* at 1008. In reviewing a challenge to the decree, we rejected the argument that promotional relief was unnecessary because other alternatives were available. *Id.* at 1009. We found that the proposed alternatives were not feasible because they did not place the plaintiffs, who were identified victims of prior discrimination, in their rightful place as expeditiously as did the relief contained in the decree. *Id.*

[35] Where relief is not provided to identified victims of discrimination, given the odious nature of race-based decisionmaking, race-neutral alternatives should be considered before a government implements an affirmative action plan using race as the sole criteria upon which promotions are based. *See Croson*, 488 U.S. at 507, 109 S.Ct. at 729 (faulting the city for failing to consider the use of race-neutral means to increase minority business participation in city contracting); *Paradise*, 480 U.S. at 171, 107 S.Ct. at 1066 (describing the need to consider the efficacy of alternative remedies when determining whether race-conscious remedies are appropriate). In examining

this requirement in this case, the district court found that the City "did attempt to correct its past discrimination in or around 1974, prior to the entry of the consent decree" in 1981. *Bennett*, 806 F.Supp. at 929. The district court noted that an affirmative action ordinance designed to increase minority hiring by the City was enacted by the City Council in 1974, but was later vetoed by the Mayor. *Id.* at 929-30. The district court also noted that a subsequent measure was enacted which placed responsibility on various department heads to set and achieve minority employment goals. *Id.* at 930. The district court found that "[t]hese alternative measures were not effective, as evidenced by the hiring of only two blacks in the Fire Department by 1974" and by the fact that, as of the month before the consent decree was formally entered in 1981, "only 9.3% of the firefighters were black." *Id.*

The district court's finding that alternative measures to the race-based promotion plan in the City decree were not effective is clearly erroneous. First, the fact that only two blacks were hired in the BFRS by 1974 has no bearing on the effectiveness of affirmative action efforts implemented after 1974. Second, post-1974 hiring data indicate that the City had made significant progress in adding blacks to the firefighter ranks prior to entering the consent decree.[22] The effectiveness of the City's

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[22] We are unable to determine from the record how much of this progress to attribute to the effect of the City Council measure ordering department heads to set and achieve minority employment goals and how much to attribute to the curative measures the district court ordered the Board to take after finding that its entry-level tests had an adverse impact on blacks. We presume that the two worked in concert.

pre-decree efforts in hiring blacks as firefighters appears in the chart below:

Year	Black Firefighters	Non-Black Firefighters	Total Firefighters	Percent Black
1974	2	n/a	n/a	n/a
1978	8	429	437	1.89%
1981	42	411	453	9.3%

As the chart demonstrates, between 1978 and 1981, the City increased the number of black firefighters from eight to forty-two—a five-fold increase that was achieved in the absence of the race-based affirmative action plan embodied in the consent decree. We regard this progress as encouraging, not ineffective. Unlike the situation in *Croson*, where there was no evidence in the record that the city had even considered alternatives to race-based quotas, *Croson*, 488 U.S. at 507, 109 S.Ct. at 729, there is strong evidence in the record of this case that the City implemented effective alternatives to race-based quotas to remedy its prior discriminatory behavior. While the district court correctly concluded that, when the decree was entered, no black had as yet become a fire lieutenant, we believe that, given the City's progress at the entry-level, alternative measures designed to increase black representation in the fire lieutenant ranks were feasible.

Appellants suggest several feasible alternatives to the race-based promotion remedy implemented by the City that could have made a significant difference in the representation of blacks among fire lieutenants. For example, Appellants propose eliminating the addition of seniority points to the test score when determining the final score that dictates an employees' place on the eligible register. *See supra* part I.D. This race-neutral alternative would prevent non-black firefighters from benefiting in the promotion context from the City's prior discrimination against blacks in entry-level hiring. The non-black status quo in the fire lieutenant ranks would not be

preserved as a result of a seniority system that is a vestige of the City's prior discrimination against blacks. Under such a system, recently-hired blacks who score higher on promotion exams than more senior non-blacks would rank higher on the eligibility register and be promoted sooner than their lower ranking but more senior non-black co-workers. Appellants also suggest that, if the Board's promotion exams had an adverse impact on blacks, a race-neutral alternative to those exams would be implementation of another test that has no such adverse impact. In addition, we note that the City could have implemented an affirmative action plan, like the one approved in *Johnson*, that accounted for the race of a candidate as one factor among many to be considered. The record indicates that, in spite of its progress at the entry level, the City considered no feasible alternatives to the race-based promotional quota system for fire lieutenants before it implemented this system as a remedy for prior discrimination. Considering the efficacy of alternative remedies, the relief provided in the decree cannot be reconciled with the requirement that a government's use of race must be narrowly tailored.

[36] 2. *Flexibility and Duration of Race-Based Relief.* In *Howard*, we identified several aspects of the consent decree that readily demonstrated its flexibility, short duration, and minimal adverse effects on non-beneficiaries. *Howard*, 871 F.2d at 1009. First, the *Howard* decree did not prevent non-black employees from being promoted because promotions to the target positions from the special promotion roster alternated with those from the general roster, while leaving most positions to be filled by open competition. *Id.* Second, the plaintiffs had to meet certain qualification criteria in order to be promoted. *Id.* Third, the government was not required to make unnecessary promotions simply for the sake of providing relief to the plaintiffs. *Id.* Fourth, the relief was not intended "to set employment percentage goals or ensure a racially balanced workforce, and it evaporate[d] when the 240 promotions [were] made." *Id.* A comparison of the decree we approved in *Howard* with the City decree in this case reveals some similarities, but some more significant differences.

Like the *Howard* decree, the City decree does not require unnecessary promotions in providing relief. The City decree also requires that persons who benefit from the race-based promotional relief must be Board-certified as eligible for promotion. Further, the City decree does not prevent non-black firefighters from being promoted to fire lieutenant, calling instead for alternating promotions between blacks and non-blacks. In *Howard*, however, the burden of the promotion plan on non-black employees was more diffused than the burden on non-black firefighters in this case. There were numerous promotion opportunities in *Howard* for which black and non-black employees might compete, irrespective of race, beyond the 38 positions targeted by the decree. By comparison, in this case the only promotional position for which a firefighter might reasonably compete is fire lieutenant. A firefighter would be unlikely to compete for promotions outside the career path of the BFRS. Therefore, although the City decree does not prevent promotions of non-black employees, it places a greater burden on a smaller number of non-black firefighters than the *Howard* decree placed on larger numbers of non-black Air Force Base employees.

There is absolutely no similarity, however, between the decree approved in *Howard* and the City decree in the overall objective and operation of the two decrees. The *Howard* decree was intended to provide specific relief to victims of past discrimination. It did not attempt to ensure a racially balanced workforce through "blind hiring by the numbers . . . amount[ing] to a rigid and impermissible quota system." *Id.* The overall objective of the City decree, on the other hand, is for the City to employ blacks in each job classification in each of its departments in percentages which approximate the percentage of blacks in the civilian labor force of the surrounding county. Decree ¶ 5.

To achieve that objective among fire lieutenants, the City decree sets a 50% annual quota for promotions of blacks. As we explained earlier, in order to meet both its overall objective and its annual quota, the City classifies firefighters by race and makes promotion decisions based solely upon the race of the

candidate. For every two promotions to fire lieutenant, one is made from the list of eligible black firefighters and one is made from the list of eligible non-black firefighters. Such use of race by the City is not narrowly tailored to provide a proper remedy for past discrimination. Rather, it is designed to achieve the unconstitutional objective of outright racial balancing.

The Supreme Court has determined that it is "'completely unrealistic' [to assume] that minorities will choose a particular trade in lockstep proportion to their representation in the local population." *Croson*, 488 U.S. at 507, 109 S.Ct. at 729; *see also Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421, 493, 106 S.Ct. 3019, 3059, 92 L.Ed.2d 344 (1986) (O'Connor, J., concurring in part and dissenting in part) ("[I]t is completely unrealistic to assume that individuals of each race will gravitate with mathematical exactitude to each employer or union absent unlawful discrimination."). This determination comes despite the Court's acknowledgment that "absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired." *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 340 n. 20, 97 S.Ct. 1843, 1856 n. 20, 52 L.Ed.2d 396 (1977). There is, however, a considerable difference between expecting to find a balanced work force, absent discrimination, and a governmentally imposed plan using race to ensure a racially balanced work force. *See id.* at 340 n. 20, 1856 & n. 20 (noting that, while statistics showing racial imbalance are a probative evidentiary tool often demonstrating telltale signs of racial discrimination, they cannot support "an erroneous theory that Title VII requires an employer's work force to be racially balanced").

The City's use of the 50% annual quota to establish a work force of fire lieutenants reflecting black employment in lockstep proportion to the proportion of blacks in the local labor force cannot withstand strict scrutiny. *See Croson*, 488 U.S. at 507, 109 S.Ct. at 729 (finding that a city's 30% contract set-aside for minority businesses "cannot be said to be narrowly tailored to

any goal, except perhaps outright racial balancing"); *Cone Corp.*, 908 F.2d at 914 (defining narrow tailoring in the context of a minority business enterprise plan to "mean[] that the plan must be designed to further some goal other than outright racial balancing"); *Mann v. City of Albany*, 883 F.2d 999, 1005 (11th Cir.1989) (noting that a majority of the Supreme Court has "expressed clear hostility toward government affirmative-action programs that distribute opportunities woodenly and inflexibly on the basis of an applicant's race"). The City decree institutionalizes race as the sole criteria by which the City selects certified candidates for promotion to fire lieutenant.

The City's rigid approach, while administratively convenient, is not a narrowly tailored means to remedy prior discrimination. It is instead an approach designed to achieve government-mandated racial balancing—the perpetuation of discrimination by government. We can imagine nothing less conducive to eliminating the vestiges of past discrimination than a government separating its employees into two categories, black and non-black, and allocating a rigid, inflexible number of promotions to each group, year in and year out. We conclude that the City's use of race in its affirmative action plan is not narrowly tailored to achieve a compelling government interest. Instead, it provides for "blind hiring by the numbers . . . amount[ing] to a rigid and impermissible quota system." *Howard*, 871 F.2d at 1009.

[37] 3. *Relationship of Numerical Goals to the Relevant Labor Market.* We explained above that fire lieutenants are promoted from the ranks of firefighters, making firefighters the relevant comparison group to which the numerical goals of the decree must be related. *See supra* part III.A. We have also determined that there is no relationship between the numerical goal for fire lieutenant promotions and the representation of blacks among firefighters. As such, the City's affirmative action plan does not use race in a narrowly tailored manner.

[38] 4. *Impact of the Relief on Appellant*s. The relief provided by the decree in *Howard* had a limited impact on non-black employees. Certain promotions of non-black employees

were delayed while the victims of past discrimination were afforded relief. This impact was limited to the length of time it took to achieve the legitimate objective of providing promotional relief to discrimination victims and the decree evaporated after the 240 promotions were made. *Howard*, 871 F.2d at 1009-10. In addition, non-black employees remained eligible for and experienced no delay in pursuing promotions to any of the multitude of jobs outside the 38 targeted by the decree. In fact, in the twenty-month period during which the decree operated, promotions made pursuant to the decree amounted only to slightly more than 4% of all promotions made. *Id.* at 1010. Under those circumstances, we determined that the burden of the race-based promotion decisions imposed on non-black employees did not "fall upon a narrow segment of the work force" and was "relatively diffuse." *Id.* at 1009-10.

The impact of the City decree on the non-black Appellants in this case is much more focused than that of the *Howard* decree. First, the alternating promotion aspect of the *Howard* decree delayed some promotions only until the legitimate objective of providing relief to identified discrimination victims was met. The provisions of the City decree, on the other hand, continue in place until the City achieves its unconstitutional racial balancing objective or until the district court terminates the decree. Second, while the non-black intervenors in *Howard* had open to them many other promotion opportunities beyond those affected by the decree, in this case non-black firefighters with more than two years' experience could only reasonably expect to compete for promotions in the BFRS to fire lieutenant. When the City decree was implemented, those among the 42 black firefighters who had two years' experience found half of all promotions to lieutenant immediately reserved for competition between them and only them, as a result of their race. Those among the 411 non-black firefighters with two years' experience were consigned by their races to competing for the other half of promotions to lieutenant. Thus, the impact of the decree on non-black firefighters in this case was not "relatively diffuse," but was instead quite pointed.

In *Howard*, we found that race was used by the government to provide affirmative remedies for prior discrimination in as narrow a manner as possible under the circumstances. In this case, however, as we concluded above, the City did not use race as a narrowly tailored remedy for prior discrimination. "Under strict scrutiny the means chosen to accomplish the State's asserted purpose must be specifically and narrowly framed to accomplish that purpose." *Wygant*, 476 U.S. at 280, 106 S.Ct. at 1850. The use of race by government in its decision-making is "simply too pernicious to permit any but the most exact connection between justification and classification." *Fullilove v. Klutznick*, 448 U.S. 448, 536, 100 S.Ct. 2758, 2805, 65 L.Ed.2d 902 (1980) (Stevens, J., dissenting). The City decree uses race as an overbroad remedy, categorizing BFRS employees by race and promoting them woodenly and reflexively in rigid adherence to a quota system. This broad brush approach, designed to achieve outright racial balancing through an inflexible but administratively convenient quota system, and implemented without consideration of feasible, race-neutral alternatives designed to remedy prior discrimination, is unconstitutional. The decree violates the Appellants' rights under the Equal Protection Clause of the Fourteenth Amendment.

V. Conclusion

We hold that the fire lieutenant promotion provisions of the affirmative action plan embodied in the 1981 City decree violate both Title VII of the Civil Rights Act of 1964 and the Equal Protection Clause of the Fourteenth Amendment. We affirm the district court's holding that the Civil Rights Act of 1991 does not bar Appellants' claims. On remand, the district court should provide appropriate relief consistent with this opinion. Accordingly, the judgment of the district court is

AFFIRMED in part, REVERSED in part, and REMANDED.

James A. BENNETT, et al., Plaintiffs,

v.

Richard ARRINGTON,

et al., Defendants.

B'HAM ASS'N OF CITY EMPLOYEES,

et al., Plaintiffs,

v.

Richard ARRINGTON,

et al., Defendants.

Robert L. WILKS, et al., Plaintiffs,

v.

Richard ARRINGTON,

et al., Defendants.

In re BIRMINGHAM REVERSE DISCRIMINATION EMPLOYMENT LITIGATION.

Nos. CV 82-P-0850-S, CV 82-P-1852-S, CV 83-P-2116-S and CV 84-P-0903-S.

United States District Court,

N.D. Alabama, S.D.

Aug. 14, 1992.

In reverse discrimination suit, the District Court, Pointer, Chief Judge, held that actions taken by city pursuant to consent decree entered into in connection with allegedly discriminatory hiring and promotion of black and female fire fighters did not violate constitutional rights of white fire fighters who alleged "reverse discrimination."

Ordered accordingly.

District court was required to apply strict standard of review, or strict scrutiny, to city's decision-making process, in determining whether city's decisions pursuant to consent decree entered into in connection with allegedly discriminatory hiring and promotion of black and female fire fighters violated constitutional rights of white fire fighters, since case was founded on race- based employment decisions by public employer, albeit pursuant to court- approved remedial action.

In action alleging that city's decisions pursuant to consent decree entered into in connection with allegedly discriminatory hiring and promotion of black and female fire fighters violated constitutional rights of white fire fighters, burden on defendants in action was not to prove at trial existence of past discrimination by city; rather, issue was whether, at time it agreed to consent decree, city had strong basis in evidence for believing that there had been discrimination against blacks and women. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

Actions taken by city pursuant to consent decree entered into in connection with allegedly discriminatory hiring and promotion of black and female fire fighters did not violate constitutional rights of white fire fighters who alleged "reverse discrimination"; city showed that before entering into consent decree it had strong basis in evidence for believing that it had discriminated against minorities, and consent decree was sufficiently limited and tailored to appropriate relief. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

Barbara Thawley, Washington, D.C., for U.S. Dept. of Justice, Civ. Rights Div.

Jack Selden, U.S. Atty., Caryl Privett, Asst. U.S. Atty., Birmingham, Ala., for U.S. Atty.

Thomas L. Stewart, Laveeda Morgan Battle, Birmingham, Ala., Personnel Bd. of Jefferson County.

James Alexander, Robert Spotswood, Birmingham, Ala., for City of Birmingham and Arrington.

Demetrius Newton, City Atty., Birmingham, Ala., for Birmingham.

Raymond Fitzpatrick, Birmingham, Ala., for plaintiff intervenors in consolidated cases.

Susan Reeves, Birmingham, Ala., Robert D. Joffe, New York City, St. John Barrett, Washington, D.C., for defendant intervenors.

OPINION

POINTER, Chief Judge.

The City of Birmingham ("the City") and the Jefferson County Personnel Board ("the Board"), after prolonged litigation in the 1970s over discriminatory hiring and promotion of blacks and females, entered into settlement negotiations with a class of black plaintiffs ("the Martin Intervenors") and the United States. The negotiations resulted in separate proposed consent decrees with the City and the Board. A fairness hearing was held in August 1981 to consider objections from all interested parties. The Birmingham Firefighters Association ("BFA"), as amicus curiae, presented arguments opposing the consent decrees. Their opposition focused on the proposed affirmative action goals, which would impact adversely on white males in the Fire Department.

The court approved the consent decrees on August 18, 1981. The following day the BFA and two white firefighters moved to intervene in the suit. Their motion was denied as untimely, a ruling that was later upheld by the Eleventh Circuit in *United States v. Jefferson County*, 720 F.2d 1511, 1520 (11th Cir. 1983). A separate suit (CA 82-P-850-S) was then filed by seven white firefighters against the City and the Board, claiming "reverse discrimination" would result from enforcement of the consent decrees. An application for a preliminary injunction was denied, and the Eleventh Circuit affirmed, ruling that the white firefighters were unable to show irreparable harm if the decrees were enforced. *United States v. Jefferson County*, 720 F.2d at

1520, 1519-20 n. 21. Similar cases were later filed by other white employees of the City.

These cases were consolidated as the "Birmingham Reverse Discrimination Employment Litigation." Once the Martin Intervenors intervened as party defendants to defend the decrees, a motion for partial summary judgment was brought by the City and the intervening parties. The motion for partial summary judgment was denied, and a trial was held in December 1985 on the merits of three test cases.[23] Following the trial, the court denied the plaintiffs' claims.[24] An appeal followed, and the Eleventh Circuit held that the white plaintiffs were not bound by the consent decrees since they were not a party to them. *In re: Birmingham Reverse Discrimination Employment Litigation*, 833 F.2d 1492 (11th Cir. 1987). The Supreme Court agreed with the Court of Appeals. *Martin v. Wilks*, 490 U.S. 755, 109 S.Ct. 2180, 104 L.Ed.2d 835 (1989). The case was remanded to the district court for a further trial on the merits of the plaintiffs' reverse discrimination claims. Following additional discovery, the trial was held October 21, 1991, and post-trial briefs and reply briefs were submitted by the parties. Upon consideration of the evidence before the court, the court concludes that plaintiffs' claims must be denied.

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[23] The three test cases were CV 83-P-2116-S, involving the claims of plaintiffs Robert K. Wilks, Ronnie J. Chambers, Carlice E. Payne, John E. Garvich, Jr., Robert Bruce Millsap, James W. Henson, Howard E. Pope, and Charles E. Carlin; CV 82-P-850-S, involving the claims of plaintiffs Floyd E. Click, James D. Morgan, Joel Alan Day, Gene E. Northington, Vincent Joseph Vella and Lane L. Denard; and CV 82-P-1852-S, involving the claims of plaintiffs Kenneth O. Ware and the Birmingham Association of City Employees. The plaintiffs in the first two cases listed here were employees of the Birmingham Fire Department; Kenneth O. Ware, an individual plaintiff in the third listed case, was a City Civil Engineer. There have been other members of the fire and engineering departments allowed to intervene in CV 84-P-0903-S.

[24] Numerous findings of fact were made by the district court. See 39 F.E.P.C. 1431-46 (BNA) (N.D. Ala. 1985). There is no need to repeat these findings, which were not set aside on the appeal and under the law of the case remain as determinations for purposes of this decision.

STANDARD OF REVIEW

[1] Since this case is founded on race-based employment decisions by a public employer, although pursuant to a court-approved remedial action plan, the court must apply a strict standard of review, or strict scrutiny, to the city's decision-making process. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493, 109 S.Ct. 706, 720, 102 L.Ed.2d 854 (1989) (O'Connor, J., separate opinion).

CIVIL RIGHTS ACT OF 1991

An initial matter to be addressed is the applicability of section 108 of the Civil Rights Act of 1991. Section 108 amends 42 U.S.C. § 2000e-2 to provide that employment decisions made pursuant to a valid consent decree which is entered under claims of public employment discrimination may not be challenged on a constitutional basis (i) by a person who, prior to the entry of decree, had actual notice of the decree sufficient to advise him that it could adversely affect him and that he could challenge it, and an opportunity to object, or (ii) "by a person whose interests were adequately represented by another person who had previously challenged the [decree] on the same legal grounds and with a similar factual situation, unless there has been an intervening change in law or fact." It is unnecessary to step into the mire of possible retroactive application of this section, since neither of the conditions was satisfied. The court's decision therefore is grounded in the constitutional analysis developed in recent Supreme Court rulings.

ANALYSIS

[2, 3] The central issue is whether the constitutional rights of the white firefighters were violated by the promotional decisions made by the City pursuant to the consent decree entered into by the City, the United States, and the Martin Intervenors.[25] The Eleventh Circuit directed this court to

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[25] The court had decided at the December 1985 trial that these promotional decisions had been made pursuant to the decree. 39 F.E.P.C. 1431 (BNA) (N.D. Ala. 1985). These findings were not disturbed on appeal

evaluate whether the consent decree, while not binding on the white firefighters, nevertheless provided the basis for a defense by the City to charges of discrimination when making promotional decisions pursuant to this decree. This directive involves basic consideration of a two-pronged inquiry under *Johnson v. Transportation Agency*, 480 U.S. 616, 631, 637-38, 107 S.Ct. 1442, 1451, 1454-55, 94 L.Ed.2d 615 (1987). The first inquiry is whether the adoption of a race-based promotional plan "was justified by the existence of a 'manifest imbalance' that reflected underrepresentation of [blacks] in 'traditionally segregated job categories'." *Id.* at 631, 107 S.Ct. at 1451 (quoting *Steelworkers v. Weber*, 443 U.S. 193, 197, 99 S.Ct. 2721, 2724, 61 L.Ed.2d 480 (1979)). The second consideration is whether the plan "unnecessarily trammeled the rights of [white] employees or created an absolute bar for their advancement." *Id.* at 637-38, 107 S.Ct. at 1454-55. The court concludes that the first condition is met and that the plan did not unnecessarily trammel the rights of whites, nor did it create an absolute bar to their opportunity for advancement.

Was the City justified in entering the consent decree?

Since the City's promotional decisions were clearly race-conscious in that they were mandated by a race-conscious consent decree, the burden is on the City to show its adherence to the decree provides a valid defense for the plaintiffs' claims. The City has met that burden.

First, the City must show that before entering into the consent decree it had a "strong basis in evidence" for believing that it had discriminated against minorities. It does not have to prove that there was an actual finding, either judicial or otherwise, that it discriminated in order to show that it was justified in entering the consent decree.[26] Although *Croson* did

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by the Eleventh Circuit or the Supreme Court.

[26] The burden on the defendants in this action is not to prove at trial the existence of past discrimination by the City. Instead, the issue is whether at the time it agreed to the consent decree the City had a strong basis in

affect the way the court evaluates a claim of reverse discrimination, it did not overrule the Supreme Court's earlier holding that statistical evidence can support a finding of discrimination: "Where gross statistical disparities can be shown, they alone may in a proper case constitute prima facie proof of a pattern or practice of discrimination." *Hazelwood School District v. United States*, 433 U.S. 299, 307-08, 97 S.Ct. 2736, 2741, 53 L.Ed.2d 768 (1977), *quoted in Peightal v. Metropolitan Dade County*, 940 F.2d 1394, 1401-02 (11th Cir. 1991), *cert. denied*, -- U.S. --, 112 S.Ct. 969, 117 L.Ed.2d 134 (1992). In the 1985 trial of these cases, the court found that there was significant evidence of prior discrimination at the time the City entered into the consent decrees. *See In re: Birmingham Reverse Discrimination Employment Litigation*, 39 F.E.P.C. (BNA) 1431, 1437, ¶¶ 12-13 (N.D. Ala. 1985); *see also United States v. Jefferson County*, 28 F.E.P.C. (BNA) 1834 (N.D. Ala. 1981). The additional evidence presented in the 1991 trial confirms those findings.

It should be emphasized that, prior to the City's entering the consent decrees, there had been a district court decision—affirmed in pertinent parts by the Court of Appeals—holding that the tests used by the Personnel Board to determine persons eligible for entry-level positions in the City's police and fire departments had a severe adverse impact on blacks and were not sufficiently job-related to pass muster under Title VII. *See Ensley Branch of N.A.A.C.P. v. Seibels*, 616 F.2d 812 (5th Cir. 1980). The discriminatory restrictions on these entry-level positions also meant, of course, that blacks had been denied the opportunity to hold higher level positions in these departments. There then had been—again before the consent

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evidence for believing that there had been discrimination against blacks (and women). *See, e.g., City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986) (plurality opinion); *Howard v. McLucas*, 871 F.2d 1000 (11th Cir. 1989). Indeed, actual "findings" of discrimination need not be made by the City at all. *See Wygant*, 476 U.S. at 289, 106 S.Ct. at 1854 (O'Connor, J., concurring in part and concurring in the judgment); *Howard v. McLucas*, 871 F.2d at 1006.

decree was entered—a further trial, with voluminous evidence, attacking scores of other tests and selection devices administered by the Personnel Board as having a similar adverse impact and insufficient job-relatedness. It was only when faced with the imminence of a decision by the district court concerning these tests and devices that the consent decrees were entered.

Was the consent decree narrowly tailored?

The closer question seems to be the second prong of this inquiry: Whether the consent decree was sufficiently limited and tailored to the appropriate relief. An initial consideration in determining whether the relevant decrees were narrowly tailored is whether the City pursued other means to increase the representation of minorities in the Department. Other factors utilized by the Supreme Court in *United States v. Paradise*, 480 U.S. 149, 171, 107 S.Ct. 1053, 1066, 94 L.Ed.2d 203 (1987) (Brennan, J., plurality opinion) (citing *Sheet Metal Workers v. EEOC*, 478 U.S. 421, 481, 486, 106 S.Ct. 3019, 3052, 3055, 92 L.Ed.2d 344 (1986)), in evaluating whether race-conscious employment measures by a public employer are narrowly tailored, are "the necessity for the relief and the efficacy of alternative remedies; the flexibility and duration of the relief, including the availability of waiver provisions; the relationship of the numerical goals to the relevant labor market; and the impact of the relief on the rights of third parties." *Id.* at 171, 107 S.Ct. at 1066.

These factors, applied to the facts of this litigation, show that the decree is limited and tailored to the relief necessary to overcome the employment effects of past discrimination by the City. The City did attempt to correct its past discrimination in or around 1974, prior to the entry of the consent decree. City Mayor Richard Arrington testified that an affirmative action ordinance was proposed and submitted to the City Council which would have "establish[ed] some goals for minority hiring" and "would have permitted the City to carry out certain efforts in recruitment to try to increase the pool in which [the City] hired people. . . . It was aimed at trying to increase

minority hiring in the City of Birmingham." Trial Trans. at 96.[27] The ordinance was adopted by the City Council, but later vetoed by the then Mayor Seibels. A subsequent ordinance was later passed which placed the responsibility on various City department heads to set and achieve minority employment goals. Trial Trans. at 97-98. These alternative measures were not effective, as evidenced by the hiring of only two blacks in the Fire Department by 1974. Indeed, the employment records offered at trial show that as of July 21, 1981, only 9.3% of the firefighters were black, and none of the fire lieutenants, captains, or battalion chiefs were black.[28]

The City decree also satisfies considerations of flexibility and duration. It does not require the City to promote unqualified blacks in the Fire Department. Instead, it requires that, when both black and white firefighters are certified to the Fire Department as qualified applicants for a promotion, the Department will alternate between blacks and whites, selecting the white or black applicant who is ranked highest according to the Board's ranking procedure.[29]

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[27] Mayor Arrington, then a member of the City Council, in 1974 supported the City's adoption of the ordinance.

[28] According to the Birmingham Personnel Board's July 21, 1981, affirmative action report, 42 of 453 firefighters in the Birmingham Fire Department were black, 2 of the 10 fire communications operators were black, and zero out of 94 fire lieutenants, 31 fire captains and 15 fire battalion chiefs were black.

[29] The Board ranks individuals according to two factors. The first factor is the applicant's score on a job-related test administered by the Board. The second factor is the number of seniority points achieved by the individual. Seniority points are accumulated according to the number of years of service, with a maximum of 20 points available to an individual.

The court made specific findings of fact regarding seniority points in the 1985 trial of these consolidated cases. In short, it found that there was "no evidence demonstrating a relationship between [Department] seniority and job performance as an officer." Since blacks were effectively barred from employment in the Department, as evidenced by the presence of only two black hires before the first discrimination suit in 1974, seniority points were

The consent decree is also tailored to the relief sought by its limitation in time to achievement of the long term goal of attaining employment representation of blacks and women in the City's work force in approximate relation to their respective percentages in the civilian labor force of Jefferson County as shown in the 1970 federal census. It provided for modification in the long term goal in accordance with any changes in the appropriate work force reflected in the 1980 census. City of Birmingham Consent Decree, para. 5. Annual goals were established to meet that long term goal. Specifically in regard to promotion in the Fire Department, an interim goal was established, subject to the availability of qualified blacks, of the promotion of one black for the next two captain positions that were vacant. Thereafter, until the long term goal in the Department was met, blacks should be promoted to captain vacancies "at twice the black percentage representation in the job classification from which promotional candidates are traditionally selected for [that] job." *Id.* at para. 8. The decree further provided for direct recruitment of blacks when insufficient numbers of blacks to fill the interim goals were certified to the City by the Board. *Id.* at para. 10b(i). The decree also provided that reduction of the underrepresentation of blacks and females would be pursued through departmental affirmative action plans, *id.* at para. 11; through an affirmative job recruitment program administered through, but not limited to, local high schools, vocational schools, colleges and organizations aimed at obtaining job opportunities for minorities, *id.* at para. 14; through advertising for qualified minorities, *id.*; and through job posting, *id.* at para. 15. In addition, the decree provided that any party could move the court for dissolution of the decree after six years from the date it was entered. *Id.* at para. 55. In fact, upon motion, the decree

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found to have an "obvious adverse impact." Thus, seniority was found not to be a factor that the Fire Department could use in choosing between black and white candidates for promotion. 38 F.E.P.C. (BNA) 1431 (N.D. Ala. 1985) (Findings of Fact Nos. 58-60).

was modified in May 1991 by this court based on its continuing jurisdiction over the decree.[30]

The decree was also tailored to an appropriate relevant labor market when the City agreed to it. The decree provides for hiring goals for blacks in proportion to their representation in the labor force of Jefferson County.[31] Since the position of firefighter is an unskilled position, this is an appropriate correlation under *Johnson v. Transportation Agency*, 480 U.S. 616, 631-32, 107 S.Ct. 1442, 1451-52, 94 L.Ed.2d 615 (1987). The promotions within the Fire Department to captain and battalion chief were tied to the black representation within that Department, albeit accelerated by the original interim goal to twice the representation of blacks in the Department.

In earlier litigation of this case, the court found that "[s]ince the entry of the Decree, some [whites] have been promoted immediately upon certification, others after only a delay, and those not promoted have had or will have an opportunity to compete as each new exam is given and an eligible register

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[30] The May 1991 modifications were amended by order of the district court dated September 25, 1991, to provide, in relevant part, that the promotional goals set for blacks in paragraph 8 of the decree "shall not apply if all testing and screening procedures utilized by the Personnel Board and by the City with respect to a job classification either have no adverse impact upon such persons or are demonstrated to be valid under applicable law." September 25, 1991, order amending the consent decree with the City of Birmingham. Furthermore, the decree modification was amended to provide that the interim goals for promotions in the Fire Department would change to reflect promotions "in approximately the same proportion as the percentage of black applicants for such positions" once the hiring goals for blacks in the Department were met. *Id.*

[31] Expert witness testimony regarding the City's selection of the relevant labor force shows that the City did not select the labor force which would have reflected the highest percentage of blacks. The labor force of the City of Birmingham proper, according to the 1980 federal census, consisted of 49.9% blacks and 50.1% whites, while the labor force of Jefferson County was 28.1% blacks and 71.9% whites. Use of the City's relevant labor force in fashioning the City's goals would have resulted in significantly higher goals for black employment.

(which is valid for only a year) is created." *See* 39 F.E.P.C. (BNA) 1431 (N.D. Ala. 1985) (Findings of Fact No. 14). These findings show that the effect on third parties, specifically the white firefighters complaining of racial discrimination in this case, is an acceptable burden. There were no provisions to use layoffs as a means for favoring junior black employees over more senior white employees, nor was there an absolute bar to promotions for white Department members, since half of the promotions would be whites. *See Johnson v. Transportation Agency*, 480 U.S. 616, 631-32, 107 S.Ct. 1442, 1451-52, 94 L.Ed.2d 615 (1987).

CONCLUSION

This court concludes that the City's actions, taken pursuant to the consent decree constituted valid, constitutional decisions. *See, e.g., Stuart v. Roache*, 951 F.2d 446 (1st Cir.1991), *cert. denied*, -- U.S. --, 112 S.Ct. 1948, 118 L.Ed.2d 553 (1992). The various claims, counterclaims, and crossclaims in CV 82-P-850-S, CV 82-P-1852-S, and CV 83-P-2116-S must be denied. In the absence of any just reason for delay, the order accompanying this opinion also directs final judgment in CV 84-P-0903-S pursuant to Fed.R.Civ.Proc. 54(b) to the extent these matters have previously been incorporated as part of that case.

Order and Final Judgment

In accordance with the accompanying Opinion, it is ORDERED and ADJUDGED as follows:

1. All claims, counterclaims, and crossclaims in CV 82-P-850-S are DISMISSED with prejudice, and each party shall bear its own costs.

2. All claims, counterclaims, and crossclaims in CV 82-P-1852-S are DISMISSED with prejudice, and each party shall bear its own costs.

3. All claims, counterclaims, and crossclaims in CV 83-P-2116-S are DISMISSED with prejudice, and each party shall bear its own costs.

4. All claims for attorneys fees in CV 82-P-850-S, CV 82-P-1852-S, and CV 83- P-2116-S under 42 U.S.C. s 1988, Title VII of the Civil Rights Act of 1964 and 28 U.S.C. s 2412(d) are DENIED.

Pursuant to Fed.R.Civ.P. 54(b), the Court determines that there is no just reason for delay, and expressly directs that judgment in CV 84-P-903-S be entered to the extent the claims, counterclaims, and crossclaims described in paragraphs 1-4 of this order have otherwise been incorporated as part of CV 84-P-903-S.

In re: BIRMINGHAM EMPLOYMENT LITIGATION

U.S. District Court,

Northern District of Alabama

In re: BIRMINGHAM REVERSE DISCRIMINATION EMPLOYMENT LITIGATION, No. CV 84-P-0903-S, December 20, 1985

CIVIL RIGHTS ACTS OF 1866, 1871, AND 1964

City's promotion of black firefighters was required by consent decree, and higher-ranked white firefighters who otherwise would have been promoted therefore cannot obtain relief under 42 U.S.C. § 1981, 42 U.S.C. § 1983, or Title VII, where decree allowed exception to promotion goals only if decisionmakers had information demonstrating that a black, although qualified, was demonstrably less qualified than a white on basis of job-related selection device, but while it has been assumed that tests used by personnel board are job-related, city's decisionmakers did not have information available to them on which they could have made any kind of judgment that blacks scoring lower on examinations scored sufficiently lower to be demonstrably less qualified than higher-ranked whites.

No attorneys' fees will be assessed against white firefighters who brought unsuccessful reverse discrimination action challenging city's promotion of lower-ranked blacks pursuant to consent decree, where whites' cases had sufficient merit to justify their pursuit.

See also 37 FEP Cases 1.

Raymond P. Fitzpatrick, Jr., and Albert L. Jordan (Fitzpatrick & Jordan), Birmingham, Ala., for plaintiffs.

Ralph E. Coleman, Birmingham, Ala., for plaintiff William L. Garner.

James K. Baker, City Attorney, Birmingham, Ala., and James P. Alexander, Robert K. Spotswood, Eldridge D. Lacey, Richard H. Walston, and Greg Hawley (Bradley, Arant, Rose &

White), Birmingham, Ala., for defendants Richard Arrington, Jr., and City of Birmingham.

David P. Whiteside, Jr., Michael L. Hall, and Anne P. Wheeler, Birmingham, Ala., and Johnston, Barton, Proctor, Swedlaw & Naff, Birmingham, Ala., for defendant Jefferson County Personnel Board.

W. Bradford Reynolds, Assistant Attorney General, and Mary E. Mann, William R. Worthen, and James S. Angus, U.S. Department of Justice, for plaintiff-intervenor United States.

William L. Robinson and Stephen L. Spitz, Washington, D.C., Robert D. Joffe, George C. Whipple, III, Roy E. Hoffinger, and Alden L. Atkins (Cravath, Swaine & Moore), New York, N.Y., and Susan W. Reeves (Reeves & Still), Birmingham, Ala., for defendants-intervenors John W. Martin, et al.

Full Text of Oral Opinion

POINTER, Chief Judge:—The Court will now dictate its findings of fact and conclusions of law. These findings of fact are based upon the evidence that has been presented over the past four and a half days, consisting of the testimony of various witnesses and the reception into evidence of voluminous documents.

[1] I state at the outset that the conclusion that I reach is to be favorable to the defendants.

Basically the issue, the legal issue, which, as I view it, is determinative of this case is one that was stated in an order entered back in February of this year.

The conclusions there expressed either explicitly or implicitly were that under appropriate circumstances, a valid consent decree appropriately limited can be the basis for a defense against a charge of discrimination, even in the situation in which it is clear that the defendant to the litigation did act in a racially conscious manner.

In that February order, it was my view as expressed then, that if the City of Birmingham made promotions of blacks to

positions as fire lieutenant, fire captain and civil engineer, because the City believed it was required to do so by the consent decree, and if in fact the City was required to do so by the consent decree, then they would not be guilty of racial discrimination, either under Title 7, Section 1981, 1983 or the 14th Amendment. That remains my conclusion given the state of the law as I understand it.

Counsel have amply noted that the law is not clear, however, in this regard. And that this decision is being made at a time when there is uncertainty as to the state of the law.

In the effort to determine what the state of the law is, as best I can determine it, I have considered no single decision. As I evaluate the decisions particularly out of the Supreme Court, it becomes apparent to me that if you look at any one given decision, you can come up with a conclusion as to what the law is which is different from the decision you reach if you look at some other decision. And is required as a result somehow attempting to synthesize what I view to be a development in the law as yet not fully and finally defined.

Much argument has been made as this case came to trial about the burden of proof. I declined in advance of trial to rule definitively on certain hypothetical issues, because I wish to see the state of the evidence as it was presented. I am persuaded that at least in that respect my earlier decision was proper. Because it has become clear to me from the evidence in this case that it is not necessary for the Court to determine whether some action apparently permitted by the consent decree but not mandated by it would be protected against claims of discrimination.

In this case, under the evidence as presented here, I find that even if the burden of proof be placed on the defendants, they have carried that proof and that burden of establishing that the promotions of the black individuals in this case were in fact required by the terms of the consent decree.

I reach that decision on the basis that the language that has become the focus of these proceedings, namely language in paragraph two of the consent decree, would require or would allow an exception to the goals otherwise stated for the City in

other provisions of the decree only if the decision-makers at the time of making the decision had information demonstrating that a black, although qualified, was demonstrably less qualified than a white on the basis of a job-related selection device.

During the presentation of evidence here, the only possible job-related selection device that has been presented is that of the test that the Personnel Board uses. Many other criterion have been selected, none have been in any way indicated or demonstrated as being job related. Job related in this sense must be addressed in the context of the regulations under Title 7, which were in force at the time the consent decree was adopted, and indeed continued in force.

In this particular case, the tests used by the Personnel Board have simply been assumed to be valid, that is, job related. However, the evidence demonstrates that the decision-makers on the part of the city did not have the information available to them on which they could have made any kind of judgment that the blacks scoring lower on those exams scored sufficiently lower to be demonstrably less qualified than the whites who were higher ranked.

I had anticipated until this morning that at the conclusion of the case and while still attending to the case I would attempt at the conclusion of the case to dictate findings of fact in my normal manner. That is, I had anticipated that I would simply from my own memory and recollection go through the various items of evidence and make the appropriate findings with respect to the variety of issues and persons involved.

I am varying from that today in doing something that I have done only once before that I can recall. The reason for doing so is that I have received this morning some findings of fact proposed by the defendants that I find to be ninety-eight percent objective, fair and the same findings I would make.

The appellate decisions have cautioned trial courts against simply adopting proposed findings submitted by parties. I am aware of that admonition. I have, however, gone through these proposed findings and will in just a few minutes indicate certain changes that I would make in them. To the extent I do not make

changes, I adopt them as my own individual findings. This is both as to findings of fact and conclusions of law. There are in addition a few facts not contained in the findings of fact proposed by the defendants that I will recite as findings of fact by the Court.

First, I will attend to several matters that were not covered by the defendants' proposed findings of fact. Each of the plaintiffs who complains in this litigation against the failure to be appointed as a fire lieutenant or fire captain or civil engineer or who claims that he was delayed in such an appointment was adversely affected because he was white. Those persons in the absence of the consent decree and in the absence of any affirmative action plan adopted by the City as mandated by the decree would, as I interpret the evidence, have been appointed to the positions they desired and about which they here complain. Each of those individuals ranked higher on the certification list provided by the Personnel Board than the blacks who were appointed by the City pursuant to the consent decree.

Most but not all of those whites who were not selected for those positions had higher test scores on the test administered by the Personnel Board. Although the scores, as I have already indicated, were not known by the decision-makers at least with a sufficient degree of accuracy and completeness to make any judgment concerning the significance of those differences.

Several of the whites who were unsuccessful in their promotional efforts or who were delayed in those promotional efforts not only had higher test scores than the blacks who were selected but had scores which were sufficiently higher on the test that using the techniques of statistical inference would have indicated that the true test score of the white was statistically significantly greater than the true test score of the black. I state that that is true for some of the whites involved but certainly not all.

I make particular mention, although it is contained in the proposed findings of fact submitted by the defendants, that the practice of the fire department both before and after the consent

decree was to not consider qualifications in making promotions but instead is to follow willfully the certification list submitted by the Personnel Board, simply selecting the higher ranked person, whether qualified or not.

Only since the consent decree has that been changed one occasion, and that was at a time at deciding that a black who otherwise would have been mandated for promotion under the decree was not qualified. This Court upheld the decision by the City that under the particular facts of that case and that situation the black was not qualified.

With respect to the vacancy in the engineering office, the Court makes the following conditional matter that is perhaps not that explicit in the proposed findings submitted by the defendant. The white who would have been appointed to the position of civil engineer and who certainly was qualified for that position did score higher on the test than did the black who was selected. He, I am referring to Mr. Ware, is the individual who would have been selected by the chief engineer for that position had it not been for the consent decree. In noting, however, that the rankings and test scores coming from the Personnel Board were not in the engineering department deemed to be particularly valuable or useful, the chief engineer would have selected that individual Mr. Ware, even though he scored much lower than another white individual, that is the difference between his score and another white was even greater than the difference between Mr. Ware's score and the black.

Furthermore, the chief engineer in his deposition testimony indicated candidly that he considered the race of Mr. Thomas, person ultimately chosen, being black, as a negative feature. And that he would have so considered that as a negative feature, but for the fact that the consent decree required him to look otherwise at the candidate. He also noted in his deposition that although he would have preferred because of his view of the experience factor and certain other characteristics, the appointment of Mr. Ware, he could not say that Mr. Ware was to any significant degree better qualified than the person he chose, namely the black Mr. Thomas.

Now, with those additional matters being recited as findings of the Court, I will go through the proposed findings of fact submitted by the defendants and make certain revisions.

On page five, paragraph thirteen, [39 FEP Cases 1437], the last—starting with the words and similar underrepresentation, at that point the paragraph will simply read underrepresentation continues even with the actions taken under the consent decree to this day. And the following sentence will be deleted.

On page thirteen, paragraph forty-five, [39 FEP Cases 1439], that item will be revised to read as follows: Dr. Siskin did not in view of the Court's limitations as to the scope of trial conduct any studies to attempt to determine whether the Personnel Board's examinations are job related.

On the same page, paragraph forty-seven, [39 FEP Cases 1440] it should read as follows: Dr. Siskin concluded that at the 0-5 level of significance several non-selected whites' true test scores exceeded the true test scores of selected blacks by four or more SEM's.

On page fifteen, paragraph fifty-four, in the third line, [39 FEP Cases 1440, fourth and fifth lines], the word rank or, r-a-n-k space o-r, those two words are deleted.

On page seventeen, paragraph number sixty, [39 FEP Cases 1441], the second sentence is revised to read as follows: This underrepresentation resulted at least in part from discrimination against blacks. On page eighteen, paragraph sixty-three, [39 FEP Cases 1441], that paragraph is deleted. On page twenty-two, paragraph seventy-eight, [39 FEP Cases 1442], the first sentence should read as follows: Moreover the evidence reflects that over the history of this program blacks have had—excuse me, whites have had a somewhat greater opportunity than blacks to achieve medic status. On that same page, the parenthetical sentences at the bottom of the page are deleted.

On page twenty-three, in paragraph seventy-nine, [39 FEP Cases 1442], the third sentence it should read a lead worker assist his or her lieutenant. The words "or her" being added.

In paragraph eighty-one on the same page, [39 FEP Cases 1442], that is rewritten to state the lead worker position is usually assigned on the basis of station seniority. On the next page, page twenty-four, paragraph eighty-four, [39 FEP Cases 1443], that first sentence should read as follows: Additionally, as is the case with all criteria based substantially on seniority, blacks have not, as a whole had the same opportunities as white to meet this proposed criterion.

On page twenty-seven, paragraph ninety-six, [39 FEP Cases 1444], is simply a typographical correction in the spelling of the word "selection." On page twenty-eight, paragraph ninety-eight, [39 FEP Cases 1444], the last sentence, a typographical correction, the spelling of the word "consider." On page thirty, paragraph one hundred and ten, [39 FEP Cases 1444-1445], that paragraph is deleted.

On page thirty-three paragraph one hundred and twenty-three [39 FEP Cases 1445], the figures twenty-five percent are changed to fifty percent. On paragraph thirty—excuse me, on page thirty-five, paragraph one thirty-five [39 FEP Cases 1446], that should read in appropriate part, a selection procedure which relies in substantial part on subjective criteria is not a related selection procedure within the meaning of paragraph two within the City decree.

On page thirty-eight, in paragraph one forty-three [39 FEP Cases 1447], the footnote is deleted. On page forty, paragraph one forty-nine [39 FEP Cases 1447-1448], that paragraph is deleted. On page forty-one paragraph one fifty [39 FEP Cases 1448] the following shall stand as paragraph one fifty: The City decree entered by this Court immunizes the City from liability for actions required by it. Any questions concerning this proposition should be dispelled in this Circuit under the present state of the law by the decision of the Court in Palmer versus District Board. That will stand in place of what was written in paragraph one fifty.

In paragraph one fifty-two on page one forty-one and going over to page forty-two [39 FEP Cases 1448] is deleted. On page forty-two paragraph one fifty-three [39 FEP Cases 1448] the

following is substituted: Information or opinions not known to the decision-maker may not be utilized to establish that the individual selected—excuse me, that there were job related selection devices showing one candidate demonstrably better qualified than another.

In paragraph one fifty-four on the same page, the third line [39 FEP Cases 1448], the word "subject" is eliminated and substituted in its place the word "suspect, s-u-s-p-e-c-t. Two lines below that, the word "contemplated," that word is to be eliminated and instead the word "affected" is substituted for that word.

These findings and conclusions are entered at this time along with the findings and conclusions indicated at the outset of this recitation.

Entry of judgment should not be delayed or deferred. However, I am going to call upon counsel to submit to me on Monday an appropriate form of judgment that simply indicates that in accordance with the findings and conclusions dictated or incorporated by the Court in its oral charge that certain cases or claims are dismissed and directing under Rule 54-B that those findings and resolutions be made final.

I say that I ask this because there is some difficulty—I believe this case fully disposes of or resolves at the trial level the Bennett decision. But I don't believe that is so with respect to the case in which Mr. Ware had his claims, or at least I am not sure it does, and so there would have to be a 54-B finding in that case. Also since these cases were a part of a larger group of cases consolidated under the name Birmingham Reverse Employment Discrimination Case, it is for safety's sake appropriate to use 54-B to make sure that there is no question as to finality by virtue of those other cases not having been resolved at this time.

It is for that reason that I call upon counsel to make some analysis to present me with an appropriate one-page order is all it requires which clarifies which cases are due to be resolved as a result of this decision favorable to the defendants.

[2] Cost but no attorneys' fees are taxed against the plaintiffs in this case. It is clear that there is sufficient merit in these cases to justify the pursuit of them. I say that both on a subjective and objective basis and that claims by a prevailing defendant under the Christian, Burg, Garment case [*Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 16 FEP Cases 502 (1978)] would not justify an award of attorneys' fees against the plaintiffs even though the defendants have prevailed. There may be some question as to whether some change in the standards when you are talking about a reverse discrimination case, but at the present time I am persuaded that Christian, Burg, Garment is the applicable standard to be applied here, even though the—with the defendants having prevailed.

Let me stop at this point and see if counsel—I am obviously not asking for—but if counsel has any questions about the Court's ruling, the nature of it and what you are called upon to do and if you think I have totally left out a subject area that perhaps should be included in the findings. Of course, it's not to cut off a request post-judgment for additional findings, I am not asking for a waiver in that. It may be since I am sure plaintiff's counsel have not had the opportunity to fully go through these items and compare them with ones that you might want a finding on, I didn't want to place in those findings that I think are particularly favorable to the plaintiffs to help put this case in the appropriate context which had not been included in the defendant's proposal.

Does counsel know of anything that—at the present time they would ask me to consider?

Mr. FITZPATRICK: Your Honor, you are correct that we have not had an opportunity to read this which was served at, I guess about twelve noon.

With respect to the other consolidated cases, I think it would be appropriate that if there is an appeal, that some mechanism be provided for keeping those matters on hold in the event there are additional claims filed during the process in which these matters are ultimately resolved on appeal, if appealed, we also set up a mechanism for that.

THE COURT: As to those other cases, I really was not suggesting anything at the moment other than to make sure the presence of those other cases did not affect the appealability of this decision.

MR. ALEXANDER: Your Honor, from the City, I think one concern we would have in trying to avoid a repetition of the expense attended to this matter. And perhaps we can work out some way to keep the other cases in a state of limbo until this is resolved.

THE COURT: Either that or could even be that the ultimate findings that I made here are sufficiently—some of the ones are going to be involved that something in the nature of a summary judgment could be done so that those cases get to be reviewed at the very same time. That's simply something for y'all to discuss. Certainly there seem to be several possible ways of addressing this. But certainly many of the issues—

MR. ALEXANDER: The one thing I don't want to do is start police depositions Monday.

MR. FITZPATRICK: Me too.

THE COURT: I am sure of it.

MS. MANN: One point of clarification, do you want to meet with counsel on Monday or do you just want a written—

THE COURT: I would assume that there is some one plaintiff's lawyer that is in Birmingham and some one defendant's lawyer that is in Birmingham that can come to me with a one-page document and say Judge, this I think is what you are looking for. We don't agree with it, we as plaintiffs, but this is what you were trying to do in order to permit the appealability decision. I am not looking for counsel to be around, other than somebody on behalf of the plaintiffs and somebody on behalf of defendants. Thank you very much.

DEFENDANTS RICHARD ARRINGTON, JR., THE CITY OF BIRMINGHAM AND DEFENDANT-INTERVENORS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Defendants Richard Arrington, Jr., the City of Birmingham, and Defendant-Intervenors ("defendants") submit the following Proposed Findings of Facts and Conclusions of Law to assist the Court in considering defendants' Motion for Involuntary Dismissal at the close of plaintiffs' case.

FINDINGS OF FACT

1. The individual plaintiffs are white males, employed by the City of Birmingham in its Engineering Department or the Birmingham Fire and Rescue Service ("BFRS"), who contend that they have been unlawfully denied promotions on the basis of their race.

2. Also a plaintiff is the United States Department of Justice, an intervenor on the side of the plaintiffs. ("Plaintiffs" will hereafter refer to the individual plaintiffs and the United States collectively. When collective use is inappropriate, the Court will refer to "individual plaintiffs" and "United States" or "government".)

3. Defendants Richard Arrington, Jr., and the City of Birmingham (collectively the "City") admit that the Engineering Department and the BFRS have considered race in making promotions, but deny discriminatory intent, and proffer as their legitimate, non-discriminatory motive compliance with a Consent Decree entered in United States v. Jefferson County, 28 FEP Cases 1834 (N.D. Al. 1981) (the "City Decree"); discussed more fully below.

4. Defendant-intervenors represent the interests of the original black plaintiffs ("Martin plaintiffs") in *Martin v. The City of Birmingham*, as well as those of the beneficiaries of the relief won by the Martin plaintiffs and their certified classes. They join in the City's defense that the preferential promotion of blacks was legal pursuant to the City Decree.

5. On August 21, 1981, this Court entered an Order in *United States v. Jefferson County* approving as fair two consent decrees: one (heretofore designated as the "City Decree) between the City, the Martin plaintiffs, and the United States, executed May 19, 1981; and one between the Jefferson County Personnel Board (the "Board"), the Martin plaintiffs, and the United States (the "Board Decree"), also executed May 19, 1981.

6. Resolution 547-81 authorized the Mayor to enter into the City Decree (United States Exhibit 3 to Gordon Graham 1985 Deposition.)

7. The decrees generally required the City to attempt to meet certain long term and short term goals set forth in the City Decree, and the Board to "certify" to the City (as required by Alabama law under the Civil Service System ("Enabling Act")) sufficient numbers of black applicants to enable the City to meet its goals.

8. The individual plaintiffs contend that the City Decree is illegal and does not relieve the City from liability to whites who were "passed over" for promotion on account of their race. The government does not join the individual plaintiffs in their contention that the Decree is unlawful.

9. The individual plaintiffs and the government both contend that the City has exceeded the requirements of the City Degree and is hence not protected thereby. That argument consists of two necessary premises: that only employment decisions "mandated" in the sense of being required by the City Decree can provide the City with immunity for its race-conscious promotions; *and* that the City Decree does not *require* the promotion of less qualified blacks over demonstrably better qualified whites. The latter contention is grounded on ¶ 2 of the City Decree, which provides, in relevant part, that the City is not required to promote a less qualified black in preference to a demonstrably better qualified white, as determined by the results of a job related selection procedure. They thus contend that the promotion of a demonstrably less qualified black is not protected by the City Decree.

10. The individual plaintiffs contend that all blacks promoted in the Engineering Department and the BFRS since the entry of the City Decree are demonstrably less qualified than the white plaintiffs; the United States contends that only some of the white plaintiffs are demonstrably better qualified than some of the black promotees. Additionally, both the individual plaintiffs and the United States contend that some of the black promotees were unqualified for promotion at the time of their promotion.

11. In response, the City and Defendant-Intervenors contend that any action contemplated by, or made as a direct consequence of, the City Decree is lawful, and that the promotion of qualified, but demonstrably less qualified, blacks is contemplated and permitted by the City Decree. They further contend that in order to meet the goals provisions of the City Decree, the City is required to promote any black individual whom the City could not prove to be demonstrably less qualified according to the results of a job related, validated, selection procedure. Finally, the City and defendant-intervenors contend that, in any event, none of the blacks promoted are unqualified, or demonstrably less qualified, according to the results of a job related selection procedure.

12. In *United States v. Jefferson County*, supra, this Court found the City and Board Decrees to be warranted by the evidence of discrimination by the City, based on the factors set forth in *United States v. Alexandria*, 614 F.2d 1358, 22 FEP Cases 872 (5th Cir. 1980), and the other applicable decisions of the several courts of appeals. Plaintiffs have demonstrated no facts demonstrating that the previous conclusion of the Court was in any way in error.

13. To the contrary, the employment statistics reflect that blacks were seriously underrepresented in City employment, specifically in the Engineering Department and BFRS, at the time the City Decree was entered (during the 1950's, there was a period of time where blacks were not allowed to take the firefighter (Tr. (Pope)) or the civil engineer (Ex. 1982, 1983 examinations), and similar underrepresentation continues to this

day. The evidence further reflects that, absent the Consent Decree, the record of the BFRS with respect to the employment of blacks throughout the department would be as abysmal as its record when the City entered into the Decree (see generally Ex. 23, I.A-H).

14. Nor are the interest of whites trammeled by the Decree. Since the entry of the Decree, some have been promoted immediately upon certification, others after only a delay, and those not promoted have had or will have an opportunity to compete as each new exam is given and an eligible register (which is valid for only a year) is created. (See generally, certifications of eligibles.)

15. It is uncontested that the City, in its Engineering Department (compare Duncan 1982 dep. 46-47 with Duncan 1985 dep. 42) and the BFRS (Gallant dep. 663), has followed the same general promotional practices since the entry of the City Decree as were in place before the entry of the City Decree, the only material difference being that the City now considers the goals of the City Decree in making promotional decisions.

16. In the BFRS, it was Chief Gallant's pre-City Decree practice to review the personnel file of the certified individuals (Gallant dep. 488-89; Laughlin dep. 165), consult with Deputy Chief Laughlin, consider any other information he had received concerning the "certified eligibles" (Gallant dep. 214, 278, 529) (although he did not actively seek such information), and promote the eligibles in the order in which they appeared on the certification, absent a reason to believe they were not qualified to perform the duties of the position for which they were being considered (Gallant dep. 476-78; Laughlin dep. 141, 253, 328, 343, 452). The Chief made no effort to compare the qualifications of the certified individuals; the only decisions he made were whether he could prove that they were not qualified (Gallant dep. 140-41, 476; Laughlin dep. 361, 646).

17. The general procedure Gallant followed before the entry of the City Decree has not changed (Gallant dep. 663). The only material change in Chief Gallant's procedure since the entry of

the Decree is that he now alternates between blacks and whites, selecting in each case the highest ranked white or black, as appropriate under the City Decree (Gallant dep. 368, 391-92, 489-90, 818).

18. Chief Gallant's procedure of selecting the highest ranked individual is based on his belief that, as a practical matter, if not a legal matter, he is required to promote in rank order absent an ability to prove that the highest ranked individual of either race is unqualified for the promotional position (Gallant dep. 140-41, 329-40). Gallant bases his belief on experience (*id.*, 327) the strong civil service system (*id.*, 480, 633-34, 813-14), the expectation of administrative appeals and/or lawsuits by a passed over candidate (*id.*, 635-36), morale (*id.*, 894), long-standing custom and tradition (*id.*, 339, 634), and his inability to make comparison of qualifications (*id.*, 498).

19. In Chief Gallant's view, the Board certifies the candidates as qualified for promotion, and he must assume the Board is correct unless he can prove otherwise (*id.*, 140-41, 894).

20. Gallant does not base his practice of following rank order on any belief that the Board's certification procedure is effective in ranking candidates according to relative abilities. He has no knowledge of whether the Board examination tests the knowledge necessary for promotion (Gallant dep. 219), and he does not believe the highest ranked candidates are the best qualified (*id.*, 659, 871). He does not believe the Board's procedure is the best possible system (*id.*, 236).

21. Neither Chief Gallant nor Chief Laughlin are aware of any meaningful, job related method by which to compare the relative qualifications of candidates for promotion (*id.*, 498; Laughlin dep. 137, 190, 298, 300). Laughlin is not aware of any way in which to quantify the value of diverse or competing varieties of experience (Laughlin dep. 156, 450, 672).

22. Gallant would, however, reject any candidate he could show is unqualified (*id.*, 476) and has in fact rejected a black firefighter certified for promotion to Fire Lieutenant (*id.*, ___).

23. The United States (and, apparently, the individual plaintiffs) have suggested that the following criteria could and should have been considered by Chief Gallant to compare the qualifications for promotion of the individual plaintiffs to the promoted blacks: 1) the raw, converted, and final scores achieved on the Board administered promotional exam, together with the rank of the individual on the "eligible register"; 2) the BFRS seniority (length of service on the department) of each candidate for promotion; 3) the highest formal station assignment held by a candidate; 4) whether a candidate has been "certified" by the BFRS as a driver or assistant driver of an apparatus; 5) the number of months each candidate served as a leadworker or medic; 6) the number of shifts served by an individual as an acting officer; 7) any educational pay incentive received by the individual; and 8) other firefighting experience (aside from that gained in the BFRS) (See, Exhibits 139-159).

Test Score and Rank

24. Under state law, the Board has the authority and duty to "certify" candidates to the City for all positions, entry level or promotional, in the Classified Service (Enabling Act, § 16).

25. In fulfilling this obligation, the Board administers written examinations. The Board then grades the examinations, first determining a "raw score," or simply the number of questions an individual answers correctly. The Board then sets a passing point and calculates a "converted score" on a scale of seventy (70) to one hundred (100), for those who passed the exam. A "final score" is determined by adding to the converted score one point for each year of service in the classified service in the City up to twenty (20) years. Finally, the Board ranks the candidates on an "eligible register" based on the final scores.

26. Plaintiffs contend that the City should have considered test and rank information in comparing candidates for promotion. The City and Defendant-Intervenors respond that, assuming a duty to compare qualifications, the information was not reliably available to the City, nor was information necessary to enable the City to determine the significance of any differences in test scores. (The issue of the validity, vel non, of

the examinations has been severed. In light of the Court's disposition of the case, that issue need not be reached.)

27. When a department has promotional vacancies, it prepares a "request for certification" of promotional candidates. (Graham 1985 dep. 159). Prior to forwarding the request to the Personnel Board, the City Office of Personnel reviews the Request for Certification to determine, *inter alia*, whether the department is in compliance with its affirmative action plan. If not, a notation is stamped on the request, indicating that the City requests that qualified blacks and/or females be certified. (Graham 1985 dep. 161-162). The City then receives a certification of the names of individuals eligible for promotion. Prior to the entry of the Decree, the City received a number of names equal to the number of vacancies plus two additional names ("Rule of 3"). (Graham 1985 dep. 169). Since the entry of the City Decree, when the City indicates on its request for certification that its promotional goals have not been met, the Board certifies ranking individuals pursuant to the rule of three, plus the names of a sufficient number of black individuals to enable the City to meet its City Decree goals. (Graham 1985 dep. 170-71).

28. The Board forwards the certification to the City Office of Personnel which, after reviewing the certification to determine that a sufficient number of names have been identified, forwards the certificate to the department. (Graham 1985 dep. 180-81).

29. The department head selects a candidate from the certification and submits a recommendation for the Mayor's approval. (Graham 1985 dep. 180-81).

30. The only entity which can verify test score and ranking data is the Personnel Board. (Graham 1985 dep. 223-24).

31. The Certification contains only a list of names, with no reference to any score or rank (the rank of white individuals can be inferred, at least initially, by the order in which they are certified; the rank of selectively certified blacks is not reflected, nor can it be ascertained from the face of the certification.)

(Paragraph 5 Supplemental affidavit of Gordon Graham, U.S. Exhibit 5 to Gordon Graham 1985 Dep).

32. The City has never received test score information from the Board and has never relied on test scores in making promotions (except for a single interval, the circumstances surrounding which render it irrelevant to the instant controversy.) (Graham 1985 dep. 229-231; Arrington dep. 111, 113) In re: Birmingham Reverse Discrimination Employment Litigation, 37 Fair Emp. Prac. Cas. 1, 6 n.15.

33. The Board Rules and Regulations provide that test scores are confidential by reason of public policy. (PX2, Board Rule 1.11).

34. The testimony concerning whether the Board would have provided test scores to the City had the City requested was inconclusive. The Court concludes that plaintiffs have not demonstrated that the test scores were available to the City from the Board. (Arrington dep. 111, 113).

35. Plaintiffs contend that the City could have acquired rank and test score information from "informal lists", reflecting rank and test score information, created by individual promotional candidates and frequently posted, as a matter of general interest, at the stations (Tr. 851). The lists do not include descriptive statistics, such as standard error of measurement (Tr. 119, 851, 1024-25).

36. The informal lists are created through a "grapevine" process of calling various test-takers to ascertain their rank (and sometimes score) as well as the rank of any other individuals of which they may claim knowledge (Tr. 1024).

37. The informal lists are rarely complete beyond the first ten (10) to fifteen (15) positions (if complete to that point), and reflect the scores of between zero and fifty (50%) percent of the individuals listed. (Tr. 851, 1025).

38. The City considers efforts by the City employees to compile score and ranking data unreliable. (Graham 1985 dep. 223).

39. Due to problems with clerical errors, the City does not consider the Personnel Board card sent to examinees to be a reliable source of score and rank information. (Graham 1985 dep. 224).

40. The lists are generally, though not entirely, accurate with respect to the rank of the top ten (10) to fifteen (15) individuals, where listed, but are not as accurate with regard to the test scores listed, if any. (See exhibits 162-165; stipulation).

41. The Court concludes that the informal lists do not provide sufficiently complete or reliable information to enable the City to make any meaningful judgment regarding relative qualifications of promotional candidates.

42. The plaintiffs also contend that the City could have acquired test score information from the Board Consent Decree reports filed with the Court. Comparison of the filing dates of the Board's report with dates of promotions reveals that Woodrow Laster was the only black whose score could have been ascertained prior to his promotion and the Court had previously determined that Mr. Laster was promotable at a hearing on April 23, 1982. Moreover, there is no evidence suggesting that these reports were contemplated as a source of test score data and were not, under the terms of the Personnel Board Consent Decree, required to be furnished to the City.

43. Dr. Bernard Siskin is an expert qualified to testify concerning statistics. (Tr. 753-54).

44. Dr. Siskin analyzed the probability that the difference between two individuals' test scores would be as observed if their true test scores were a given number of standard errors of measurement ("SEMs") apart. (Tr. 756-57; 762-68).

45. Dr. Siskin's analysis does not show whether the Personnel Board's examinations are job related or valid. (Tr. 773-74; 793-94).

46. Dr. Siskin compared the test scores of selected (i.e., promoted) blacks with the test scores of certain non-selected (i.e., nonpromoted) whites. He used test scores from the 1982,

1983 and 1984 fire lieutenant's exam and for the 1983 fire captain's exam. (Tr. 755; PX 23; PX 101).

47. Dr. Siskin concluded that, at the .05 level of significance, several non-selected white's true test scores were 4 or more SEMs apart. (Tr. 768-71; PX 101).

48. The SEMs used by Dr. Siskin for the examinations he considered had been calculated by the Personnel Board and provided to him by counsel for the United States. (Tr. 771-778; PX 23). The SEMs had been calculated based on the Kuder-Richardson 20 reliability coefficient ("KR20"). (Tr. 787). He used raw examination scores, (Tr. 754-55), and, given the data he had, converted scores could not be used. (Tr. 772). However, he testified that he did not believe that there would be much difference in the results if converted scores were used rather than raw scores. (Tr. 773).

49. If the City had had all of the converted scores for a particular examination, it could calculate the standard deviation. (Tr. 781). The reliability coefficient which he used for raw scores could reasonably be used to calculate the SEMs for converted scores. (Tr. 782).

50. To calculate the SEMs, the City would have had to have the reliability coefficient and the standard deviation of the test being considered. (Tr. 783).

51. To calculate the standard deviation, the City would have had to have all of the examinees' scores on a particular examination. (Tr. 785-86).

52. To calculate the KR20, the reliability coefficient Dr. Siskin used, the City would have had to have the number of correct responses given to each question on the exam. (Tr. 786). Without the pass/fail rates for any of the questions, the KR20 could not have been determined. (Tr. 786-88).

53. Dr. Siskin's analysis could not have been done by the City if the only information available to the City were the informal lists of examinee's ranks and scores reflected in PX 162, PX 163, PX 164 and PX 165. (Tr. 788-90). There is no

evidence that any of the informal lists contained enough information to conduct Dr. Siskin's analysis.

54. The Court concludes that the City had no source from which it could reliably obtain sufficient information to consider in any manner on the rank or test score of a candidate on a promotional exam in comparing competing candidates. The City officials making (or recommending) candidates for promotions did not on any occasion have sufficient reliable information about the test scores and about the significance of the differences in these scores to have been justified in not promoting a minority candidate. *See*, In Re Birmingham Reverse Discrimination Employment Litigation, 37 Fair Empl. Prac. Cas. 1, 7 (N.D. Ala. 1985).

BFRS Seniority

55. Plaintiffs appear to rely on seniority as a proxy of sorts for experience gained in the BFRS. It is basically agreed that experience as a firefighter with the BFRS is valuable in terms of performing the duties of lieutenant or captain. However, the amount of experience necessary or desirable, a manner in which to quantify experience for purposes of comparing the experience of the individuals, and the relationship of years of service to experience gained appears to be largely matters of personal opinion.

56. Several witnesses, including a Battalion Chief, take the view that the quality and quantity of experience gained in a given amount of time varies widely depending on the activity of a station and the general nature of the emergencies in its territory (*e.g.*, industrial or commercial firefighting versus residential firefighting) (Tr. 79, 103-04). Other witnesses, including a Battalion Chief, testified that the station assignment is of little significance. (Tr. 178). Yet other witnesses fall between the two extremes, agreeing that station assignment can make a difference, but assigning varying degrees of significance to that difference.

57. No witness was able to state a manner in which the difference in experience could be meaningfully measured or quantified in any fashion (Tr. 103), much less one that would

reasonably measure the job relatedness of that criterion. To the contrary, those questioned on the matter professed an inability to quantify or compare experience. The Court thus finds it unnecessary to adopt any opinion as to the degree to which experience may vary, due to the Court's finding that experience cannot be measured or compared for purposes of predicting job performance as lieutenant or captain.

58. It appears clear that experience does vary to some undetermined and undeterminable extent from station to station, and hence the Court concludes that time in service is not a reliable or uniform measure of experience.*

59. Most importantly, there is no evidence demonstrating a relationship between BFRS seniority and job performance as an officer.

60. Additionally, the first black was not hired on the department until 1968 (PX 27, Tr. Bolin, 221), and only one additional black was hired prior to the initiation of the Martin suit in 1974. (Ex. 23). This underrepresentation has already been found by this Court to have resulted from discrimination against blacks. In light of the obvious adverse impact on blacks which results from considering seniority, together with the absence of any suggestion that seniority predicts job performance, the Court finds that seniority is not a factor which can be considered under the City Decree in selecting between black and white candidates.

Highest Formal Station Assignment

61. Within the general classification of firefighter, various positions exist. For example, on the engine, the positions from lowest to highest are plugman, back-up man, nozzleman/assistant driver, and driver (the driver is also frequently a "leadworker" position, recognized by the Board in

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* "[I]t could hardly be contended that because of longer city service an individual would be demonstrably better qualified for promotion." In re: Birmingham Reverse Discrimination Employment Litigation, 37 Fair Empl.Prac.Cas. at 5 n.14.

the form of 5% premium pay—the leadworker position will be addressed separately, below)

62. The general rule, which appears to be followed the vast majority of the time, is that station positions are assigned based on station or department seniority. (Tr. 89-90). While there was testimony that the captain, who assigns positions, has the discretion to appoint a less senior firefighter to a position "above" a more senior firefighter (*e.g.*, Tr. 290-91), that appears to occur very rarely, and then usually due only to the preference of the senior firefighter not to take the higher position.

63. The only case testified to in which a junior firefighter was assigned (in this case on a temporary basis) a station assignment above a more senior employee involved a junior white and senior black. (Tr. 456).

64. While there was testimony that the leadworker position provides valuable experience for the rank of lieutenant, there was no testimony suggesting that serving in one of the remaining positions, as opposed to another, had any bearing on the qualifications of an individual to serve as lieutenant or captain. (Tr. 108-109). The only testimony in that regard was from Battalion Chief Bolin, who stated that he "certainly wouldn't want to make a statement that a plugman wouldn't be eligible to be a lieutenant." (Tr. 106). While each position carries with it a specific responsibility upon arriving at a fire, the evidence reflects that once these responsibilities are fulfilled, every firefighter assists in any manner necessary or helpful at the fire scene.

65. Most significantly, there is no evidence that the specific position(s) held as firefighter are predictive of performance as lieutenant or captain.

66. Because there is no evidence that position assignment as a firefighter is predictive of performance as a lieutenant or captain, and because position assignment is tainted by reliance on seniority, the Court concludes that highest formal station assignment held is not a permissible criterion on which to base promotional decisions, particularly in light of the underlying intent of the City Decree.

Certification as Driver

67. The policy of the BFRS is to require that drivers and assistant drivers be "certified" as qualified to drive an apparatus by passing an "examination" of skills administered by Captain Smith (Tr. 188) at the drills and training field (Tr. 189). The BFRS prefers that anyone in a position which makes it likely that he or she will need to fill in as driver also be certified, though that is not always possible, and hence, not always the case. (Tr. 878).

68. In order to take the driver's test, an individual must successfully acquire a letter from his captain to Captain Smith, requesting that Smith administer the test and stating the Captain's belief that the individual is prepared for the test. (Tr. 878-79; Ex. 75). It is the obligation of the individual's officer to prepare him for the driver's exam (Tr. 214, 222) who hence bears partial responsibility for a firefighter's test result (Tr. 215). One of the blacks testified that the reason why he was not certified as a driver was that at his station only those one level below the driver could take the driver test.

69. The driver's exam is administered by Smith and includes knowledge of the equipment and the apparatus, use of that equipment, hydraulics, and a road test. (Tr. 188-191) The individual is tested on the apparatus he usually rides. If he does not ride an engine, he is tested on the engine at his station as well (Tr. 191-92). A firefighter need pass the driver's test only once, regardless of whether he transfers to an apparatus on which he has never been tested (Tr. 213).

70. The test is oral, rather than written (Tr. 192), and there apparently exists no document reflecting the questions to be asked (Tr. 209). Though the test in each case seems to be fairly uniform and exhaustive, there are no guarantees of consistency (see Tr. 193). The grading also appears to be flexible (*see*, Tr. 210, 212).

71. The first black to pass the test was Leslie Garner, who did so in 1972 (Tr. 215-16). Only 16 blacks have since passed the driver's test (Tr. 216-218).

72. Records of those passing the test are forwarded to the Chief's office; records of those failing are not. (Tr. 200-201).

73. While Smith testified that the driver's test is job related to the job of driving a fire apparatus (Tr. 219), he testified only that the knowledge covered by the driver's test was "useful" to a fire lieutenant in the performance of his duties (Tr. 222).

74. The Court concludes that the right to take the test, the test itself, and the scoring thereof, involve too much latitude left to be exercised at the discretion of superior officers. This makes the criterion of certification as driver the kind which has been found to be particularly suspect as likely to be affected by the biases of the superior. Moreover, there is no evidence on which to base a finding that passage of the driver's test is predictive of performance as a lieutenant or captain. It is not a permissible criterion on which to base promotional decisions.

Months Served as Medic

75. A "medic" is a state licensed paramedic capable of performing advanced life support procedures. The training of a medic is extensive (Tr. 135-39), and in light of the fact that 60% (Tr. 140) of all of the BFRS runs are for emergency medical service, it certainly appears to be valuable experience for an employee of the BFRS of any rank.

76. While there was testimony that being a medic was beneficial to a Lieutenant, there was also evidence that it should not be considered (Tr. 356), and there is no evidence suggesting that whatever benefit it confers can be quantified. (Tr. 824-25).

77. More significantly, there is no evidence showing that qualifying as a medic is predictive of job performance as a lieutenant or captain.

78. Moreover, the evidence reflects that blacks have been excluded from the opportunity to achieve medic status, except at their own time and expense, a burden not imposed on many of the white medics. (Tr. 100-01) The medic program was established in 1973. (Tr. 158). No black firefighters of the BFRS were in either of the first two medic classes attended by employees of the BFRS (Tr. 161-162); the department paid the

tuition for that training and allowed the selected employees to receive the training, in part, on company time (Tr. 163-64). Witnesses have been able to name only a few black paramedics out of 120 in the department as a whole. (*See*, Tr. 183). Whether this was based on the intentional exclusion of blacks from the medic program or, as is more likely, resulted from the earlier exclusion of blacks from the department as a whole is irrelevant. The fact remains that blacks as a group are substantially underrepresented in the medic ranks, a status which is likely to continue since the BFRS in 1982 stopped paying tuition and allowing time off for paramedic training. (Tr. 165). Reliance on medic status cannot be validated and is an impermissible criterion for comparing promotional qualifications.

(The Court notes that plaintiffs organized their criteria with months served as medic/months served as leadworker as one category and shifts served as acting officer as another. Because the evidence shows that the job of a medic is not comparable to the job of a leadworker, TR. 171, and further, that the value of leadworker experience, if any, is due to a leadworker's service as acting, the Court has rearranged plaintiffs' categories to conform to the evidence.)

Months Served as Leadworker and Shifts as Acting Officer

79. Leadworker status is the highest position which can be obtained by a firefighter in the BFRS. The position of leadworker carries with it responsibilities beyond those of other firefighters. (Tr. 67-68) A leadworker assists his Lieutenant in the performance of supervisory duties and can be called upon to serve as acting officer in the absence of the regularly assigned officer. (Tr. 67-68) An acting officer has the duties, responsibilities and privileges of an officer.

80. The evidence reflects the leadworker position can give a firefighter valuable experience for serving as an officer. (Tr. 67-68)

81. The leadworker position is generally assigned on the basis of station or BFRS seniority (usually station seniority). (Tr. 91, 94, 102, 148).

82. Assignment to leadworker is based on the discretion of the captain. In cases when the most senior firefighter is not promoted to leadworker, the captain chooses the leadworker based on his subjective opinion of who is most qualified. Criteria which are influenced by the subjective evaluations of supervisors are, obviously, in this context suspect.

83. However, the evidence does not support a conclusion that the mere fact of service as leadworker or acting officer predicts successful job performance as an officer. (See, Tr. 1021) While it is self-evident that leadworker and acting officer experience is valuable, and the record so reflects, there has been no testimony concluding that serving as leadworker or acting officer will necessarily make an individual a good officer. To the contrary, Battalion Chief Wood notes that the value of acting officer experience is determined by how well the individual performs as an acting officer. (Tr. 177). The mere fact of service does not reveal enough.

84. Additionally, as is the case with all criteria based substantially on seniority, blacks have been barred from meeting this proposed criteria. (Tr. 91) The testimony indicates that only one black has ever served as leadworker.

85. Due to the clear adverse impact on blacks and the absence of evidence that service as leadworker or acting officer will successfully predict job performance, leadworker and acting officer status are not permissible criteria on which to base promotional decisions.

Educational Pay Incentive

86. Pursuant to the Board rules, incentive pay is awarded for certain educational accomplishments. An individual who obtains an AAS degree in Fire Science (offered at Jefferson State Junior College) will receive a 5% pay increase. (Tr. 964, 984) An additional 5% may be obtained if an individual earns a four year degree in certain, specified fields (*e.g.*, Business Administration). (Tr. 47).

87. The Fire Science Curriculum at Jefferson State consists of approximately twenty-six (26) courses, thirteen (13) fire related courses and thirteen (13) liberal arts courses. (Tr. 46).

88. As with the other criteria heretofore discussed, opinions as to the value of fire science course work cover a broad range. A Fire Science degree was considered highly significant by some witnesses, yet relatively unimportant to others. Those who thought it should be considered in promotional decisions were unable to assign a weight to its value relative to other criteria. Others thought it should not be considered at all in making promotional decisions.

89. More significantly, there was no evidence that lieutenants or captains with a Fire Science degree perform better than lieutenants or captains without such a degree, or that a Fire Science degree predicts to any demonstrable extent the performance of an individual as an officer. Having a Fire Science degree, hence, has not been shown to be a job related selection criterion.

90. As to credit for non-fire-related degrees, there has been little or no explanatory testimony that such a degree is related to the responsibilities of a fire officer. The Court finds that any possible connection is tenuous at best and whether a candidate has a liberal arts degree is not an appropriate measure of comparison.

Other Firefighting Experience

91. The testimony reflects that firefighting experience gained outside the BFRS may be helpful, but again may not. (Tr. 358, 386). It would certainly appear to depend on the extent and complexity of the prior experience, factors not taken into account by the United States. (See, Exhibits 139-159). It appears that the BFRS's extensive training subsumes all but extensive, sophisticated prior experience. (Tr. 748).

92. More importantly, there is no evidence demonstrating a relationship between outside firefighting experience and performance as a lieutenant or captain. It is not a job related selection criterion.

93. The Court finds that prior fire experience is not a permissible criterion on which to base promotional decisions in the Fire Department.

Selection Procedure

94. The United States and plaintiffs have suggested that the foregoing criteria should have been considered collectively to compare promotional candidates. The City and Defendant-Intervenors have responded, not unfairly, that the factors are a "hodgepodge" of unvalidated criteria.

95. Irrespective of the value of any individual criterion standing alone, the Court recognizes that there has been no testimony explaining, or even suggesting, how each of the criteria should or could have been weighed and evaluated against other criteria. Those who testified on the subject were unable to suggest an analysis; and the record reflects that each individual questioned had a different notion of whether, and to what degree, a particular factor was of significance or should be considered in making promotions.

96. While plaintiffs presented a great deal of evidence suggesting that meeting certain criteria could be useful to an officer, this Court has heard not an iota of evidence that officers who meet any or all of those criteria actually perform better as officers than those who do not. Plaintiffs, in short, have not presented evidence that their proposed criteria can be combined to create a job related selection procedure, *i.e.*, a method of evaluating candidates which will accurately predict their future performance as officers.

97. Therefore, the plaintiffs have not demonstrated that any of the individual plaintiffs were at the time of their promotion demonstrably better qualified than any of the blacks certified from the same eligible register based on the results of a job related selection procedure.

Engineering Department

98. John Duncan recommends candidates for promotion in the Engineering Department. Because Duncan is personally familiar with most of the people in the Engineering Department,

his promotional practice, both pre- and post-Decree, is to base his recommendation for promotion on his assessment of the job duties of the position in question, and his knowledge of the past experience, job performance and training of the candidates for promotion. (Duncan 1982 dep. 46-47; Duncan 1985 dep. 42). Hobson Riley, Assistant City Engineer, assists Duncan in selecting candidates for promotion by interviewing the candidates and making recommendations to Duncan. (Duncan 1982 dep. 37). Of course, Duncan considered the requirements of the City Decree (See, Duncan 1982 dep. 95).

99. In Duncan's view, the Personnel Board determines whether an individual is qualified; Duncan also evaluates the individual and makes an independent determination. (Duncan 1982 dep. 83-84).

100. Neither Duncan nor Riley were aware of the test score or rank of Lucious Thomas prior to his promotion. (Riley dep. 99; Duncan 1982 dep. 104-05).

101. Riley and Duncan discussed the promotional list and recommended Lucious Thomas for the position of civil engineer based on the requirements of the City Decree. (Riley dep. 38; Duncan 1982 dep. 91-92).

102. Lucious Thomas was qualified for the civil engineer position (Duncan 1982 dep. 96; John Duncan 1985 dep. 98; Riley dep. 37-38).

103. The reasons Duncan considered Ware better qualified than Lucious Thomas were: his higher rank on the certification of eligibles, his seniority, the fact that his job performance was slightly better (Duncan 1985 dep. 114) (though he also testifies that they were "about equal" (*id.* 113)), and the fact that Mr. Thomas was black. (*id.* 191-92).

104. Duncan considered the fact that Ware was white to be a positive factor which would have supported the selection of Ware. (Duncan 1985 Dep. 191-192)

105. Though Jack Dunlap, a former supervisor of Thomas, had certain criticisms of Thomas' past performance (Tr. 1162-63), Dunlap did not discuss these criticisms with

Duncan prior to Thomas's promotion to civil engineer. (*Id.* 1176-77) Dunlap had also recommended Thomas for promotion to Chief of Party based on his job performance (Tr. 1176).

106. Duncan believes that Lucious Thomas was not demonstrably less qualified than Kenneth Ware (Duncan 1982 Dep. 97; Duncan 1985 Dep. 97-98, 113-114), and the Court so finds.

107. The promotion of Thomas was made pursuant to (Tr. 1112, 1114, 1167), and was required by the City Decree (1982 Duncan dep. 95, 97; 1985 Duncan Dep. 97-98, 113-114).

Involvement of City Administration and Promotions

108. Aside from the selection of department heads, the Mayor of the City of Birmingham and the Mayor's office have very little involvement in making promotional recommendations in the Engineering and Fire Department. (Deposition of Mayor Arrington at p. 104). Typically, the City's Office of Personnel reviews all personnel matters with the exception of Department head promotions without the involvement of the Mayor's Office. (Arrington Dep. 104; Graham 1985 Dep. 192).

109. The Mayor's view is that the certification of an individual for promotion by the Personnel Board creates a presumption that the individual is qualified. (Deposition of Richard Arrington at p. 94; pp. 33-38, 428-429, Gordon Graham 1985 Deposition). The information provided to the City by the Board relative to individuals' qualifications is scanty. The Mayor has never seen test scores of individuals certified as eligible for a position with the City of Birmingham—even of those candidates for department head positions (Deposition of Richard Arrington at p. 111), despite the Mayor's having requested the Personnel Board to allow him to see all the information that was available on candidates for the position of Police Chief. (Deposition of Richard Arrington at 113).

110. The Court finds that the City's ability to determine relative qualifications is hindered further by the Personnel

Board policy against allowing the City to take further action that the Personnel Board deems to be "additional testing." The Personnel Board's refusal to allow the Mayor to establish a three-member committee of engineers to interview candidates for the position of City Engineer is an example of the limitations imposed by the Board on the City in making employment selections and promotions. (Deposition of Dr. Ed Lamonte at p. 94, 96-97; deposition of Richard Arrington at p. 172).

111. The Court finds further that the Mayor's involvement in reviewing promotions within the Fire Department and the Engineering Department of the City of Birmingham is so slight that it merits no further attention by this Court. (Deposition of Dr. Edward Lamonte at p. 27, p. 59; deposition of Richard Arrington at p. 104, p. 356).

112. Gordon Graham, the Chief Personnel Officer of the City of Birmingham, is responsible for directing the activities of the Office of Personnel which includes supervision of personnel records, affirmative action responsibilities, benefits administration, administering the occupational safety and health plan and labor relations. (p. 33 Gordon Graham 1982 Deposition). Pursuant to the Consent Decree, the Mayor further designated Mr. Graham as the City's Affirmative Action Officer. (p. 141 Gordon Graham 1985 Deposition).

113. When the City rejects a certified candidate on the basis that the individual is not qualified, the Personnel Board recertifies the rejected candidate. (p. 391-394 Gordon Graham 1985 deposition).

114. The only factors department heads are required to consider in making promotional recommendations are the individuals certified by the Personnel Board, the requirements of the Consent Decree and the City's preferential policy toward City residents. (p. 196 Graham 1985 Deposition)

115. All applicants certified by the Personnel Board are presumed qualified unless a candidated lacks some essential skill that the Personnel Board did not test. (p. 428-429 Gordon Graham 1985 deposition).

116. As Affirmative Action Officer of the City, Mr. Graham is responsible for reviewing, prior to final selection, a department head's written justification for failure to select certified black or female applicants in jobs in which blacks or females are underrepresented under the terms of the Consent Decree. (Paragraph 3 Supplemental Affidavit of Gordon Graham, U.S. Exhibit 5 to Graham 1985 dep.).

117. The City has no formal promotional criteria. Department heads have been instructed to recommend candidates who in their judgment are qualified. (Graham 1985 dep. 423-24).

118. On occasions the Office of Personnel has accepted explanations of the failure to recommend a certified black or female pursuant to a determination by the department head that the female or black was less qualified. (Graham 1985 dep. 173-75).

119. If a department fails to recommend a certified black or female and the Consent Decree goals have not been met, when the Office of Personnel receives the recommendation from the department head he reviews the recommendation to determine if there was sufficient written justification for the failure to select a black or female. (Graham 1985 dep. 61-62, 100-101).

City Decree Interpretation

120. One purpose of the City Decree was to insure that any disadvantages to blacks and women that may have resulted from past discrimination against them are eliminated. City Decree at 2.

121. One purpose of the City Decree was to avoid the burdens and expense of litigation. City Decree at 2.

122. Paragraph 5 of the City Decree obligates the City to adopt as a long term goal the employment of blacks and women to each job classification in each department of the City in percentages which approximate their respective percentages in the civilian labor force of Jefferson County as defined by the 1970 Federal Census.

123. Paragraph 6 of the City Decree obligates the City to establish and attempt to achieve an annual goal of making probational appointments of blacks to vacancies in the position of Fire Lieutenant at a rate of 25% or at the rate of black representation among applicants, whichever is higher.

124. Paragraph 8 of the City Decree obligates the City to promote at least one black to the next two captain vacancies in the Fire Department.

125. The goals referred to above and set out in paragraphs 5, 6 and 8 of the City Decree are expressly made subject to the availability of qualified black applicants; the aforementioned goals are not expressly made subject to the availability of black candidates who are not demonstrably less qualified than competing white candidates based upon the results of a job related selection procedure.

126. The purpose of the aforementioned goals is to correct the effects of any underrepresentation of blacks and women in the City's work force.

127. Paragraph 10a of the City Decree obligates the City to request the Personnel Board to certify selectively to the City for appointment qualified blacks and females, whenever such action is necessary to enable the City to meet the aforementioned goals.

128. Paragraph 3 of the City Decree provides that "remedial actions and practices required by the terms of or permitted to effectuate and carry out the purposes of the Decree shall not be deemed discriminatory within the meaning of . . . the provisions of 42 U.S.C. §2000e-2(h), (j)"

129. Paragraph 2 of the City Decree provides that nothing in the City Decree shall be interpreted as requiring the City to hire or promote a less qualified person in preference to a person who is "demonstrably better qualified based upon the results of a job related selection procedure".

130. The purpose of paragraph 2 was to relieve the City from liability under the Decree if, although otherwise required by the Decree, it should reject a minority candidate because the

results of a job related selection procedure show that person to be demonstrably less qualified.

131. The hiring and promotion by the City of less qualified blacks in preference to competing white candidates who are demonstrably better qualified based upon the results of a job related selection procedure is permitted to effectuate and carry out the purposes of the Decree.

132. The City Decree authorizes the City, in order to meet the aforementioned goals, to hire and promote black candidates who are certified as qualified by the Personnel Board, even if such candidates are demonstrably less qualified than competing white candidates based upon the results of a job related selection procedure.

133. The Phrase "job related selection procedure", as used in paragraph 2 of the City Decree, means a selection procedure which is validated or capable of being validated.

134. The word "demonstrably", as used in paragraph 2 of the City Decree, means both clearly and measurably.

135. A selection procedure which relies in whole or in part on subjective criteria is not a job related selection procedure within the meaning of paragraph 2 of the City Decree.

136. The use of a selection procedure which has a component that would perpetuate the effects of past discrimination would be contrary to the express purposes of the City Decree; such selection procedure is not a "job related selection procedure" within the meaning of paragraph 2.

137. The City Decree does not obligate the City to compare the relative qualifications of black and white candidates for promotion prior to hiring or promoting blacks.

138. The City Decree does not obligate the City to adopt a job related selection procedure.

139. The City Decree does not obligate the City to compare scores achieved on promotional examinations by black and white candidates prior to promoting blacks.

CONCLUSIONS OF LAW

140. The City Decree is lawful. It was approved by this Court in *United States v. Jefferson County*, 28 Fair Empl. Prac. Cas. (BNA) 1834 (N.D. Ala. 1981) and plaintiffs cannot collaterally attack the Decree's validity. *See Thaggard v. City of Jackson*, 687 F.2d 66, 32 FEP Cases 228 (5th Cir. 1982); *Dennison v. Los Angeles Department of Water & Power*, 658 F.2d 694, 26 FEP Cases 1739 (9th Cir. 1981); *Austin v. County of DeKalb*, 572 F.Supp. 479, 39 FEP Cases 1561 (N.D. Ga. 1983). [Joint Pretrial Memorandum of Defendants, the City of Birmingham, Richard Arrington, Jr. and Defendant-Intervenors, "Pretrial Mem.," at 65-68.] The United States has conceded it is not attacking the Decree's lawfulness and as a signatory it cannot. City Decree ¶3. The only avenue of attack open to the private plaintiffs is to show that challenged action was not taken pursuant to the Decree. *United States v. Jefferson County*, 720 F.2d 1511, 1518, 33 FEP Cases 829 (11th Cir. 1983). Furthermore, under all the relevant case law of the Eleventh Circuit and the Supreme Court, it is a proper remedial device, designed to overcome the effects of prior, illegal discrimination by the City of Birmingham. *United States v. Jefferson County*, 28 Fair Emp. Prac. Cas. (BNA) 1834 (N.D. Ala. 1981). *See United States Steelworkers v. Weber*, 443 U.S. 193, 20 FEP Cases 1 (1979); *Palmer v. District Board of Trustees*, 748 F.2d 595, 36 FEP Cases 778 (11th Cir. 1984); *United States v. City of Alexandria*, 614 F.2d 1358, 22 FEP Cases 872 (5th Cir. 1980); *Paradise v. Prescott*, 767 F.2d 1514, 38 FEP Cases 1094 (11th Cir. 1985). [Pretrial Mem. at 69-84.]

141. The burden of proof is on plaintiffs. Once defendants show that promotions were made pursuant to a consent decree, the burden shifts to the plaintiffs to prove by a preponderance of the evidence either that the promotions were not undertaken to meet the goals of the decree or that the decree is invalid. Palmer v. District Board; *Setser v. Novack Investment Co.*, 657 F.2d 962, 26 FEP Cases 513 (8th Cir. 1981); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 25 FEP Cases 113 (1981). Evidence that race was considered in an affirmative action context is not the equivalent of the finding of direct

discrimination that shifts the burden of persuasion to the defendants. *Dougherty v. Barry*, 607 F.Supp. 1271, 37 FEP Cases 1201 (D.D.C. 1985).

142. In light of the City Decree, plaintiffs cannot prevail if they do not establish that the City acted with unlawful discriminatory intent. That an action was taken pursuant to a valid affirmative action plan or consent decree is proof that it was not taken with the requisite discriminatory intent. *United States v. Jefferson County*, 720 F.2d at 1518; *Palmer v. District Board*, 748 F.2d at 601. [Pretrial Mem. at 22-25.]

143. "Job related selection procedure," as the term is used in paragraph two of the Decree, refers to a validated employees selection procedure.** *See Blake v. City of Los Angeles*, 595 F.2d 1367, 19 FEP Cases 1441 (9th Cir. 1979); *Craig v. County of Los Angeles*, 626 F.2d 659, 24 FEP Cases 1105 (9th Cir. 1980); *United States v. Georgia Power Co.*, 474 F.2d 906, 5 FEP Cases 587 (5th Cir. 1973). [Pretrial Mem. at 30-37.]

144. "Any attempt to assess the relative qualifications of two individuals on the basis of their test scores is a risky process, and at a minimum requires knowledge of the magnitude of the difference in their scores if not also the significance of that difference given the characteristics of the measuring device. The need for such information under paragraph 2 of the consent decree is highlighted by the language of that paragraph relieving the city from its minority

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** Indeed, more than three years ago and only one year after entry of the City Decree, Mr. Fitzpatrick, counsel for the private plaintiffs, interpreted paragraph two to require a "validated" procedure:

> "Whether the City uses [statistics pertaining to test scores] in making their decisions or not, we don't claim is relevant to the question of whether or not *in fact one person possesses superior job related qualifications in accordance with a validating (sic) procedure and that is our interpretation and understanding of paragraph 2.*"

(Emphasis added.) *B.A.C.E. v. Arrington*, CV 82-P-1852-S, T.R.O. Hearing on September 21, 1982, Transcript at 49.

employment goals only if such minority applicants are 'demonstrably' less qualified.**

** Of the common meanings of the word "demonstrably," the ones most suitable in this context are "obviously" or "clearly."

In re: Birmingham Employment Litigation, 37 Fair Emp. Prac. Cas. 1, 6-7 (N.D. Ala. 1985).

145. The criteria upon which plaintiffs are relying to prove comparative qualifications have not been shown to be valid; furthermore, they are the kind of criteria that have been viewed suspiciously by courts because of their subjectivity and tendency to perpetuate the effects of past discrimination. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 10 FEP Cases 1181 (1975); *Miles v. M.N.C. Corp.*, 750 F.2d 867, 36 FEP Cases 1289 (11th Cir. 1985); *Walker v. Jefferson County Home*, 726 F.2d 1554, 34 FEP Cases 465 (11th Cir. 1984); Ensley Branch, *NAACP v. Seibles*, 616 F.2d 812, 22 FEP Cases 1207 (5th Cir. 1980). [Pretrial Mem. at 37-46.] Any selection procedure which utilizes subjective criteria or length of service —or other criteria which have been tainted by subjectivity or consideration of length of service—cannot be reconciled with the City Decree, which was expressly intended to ensure an end to discrimination against blacks, and to remedy any disadvantage to blacks resulting from past discrimination.

146. The hodge-podge of "criteria" proposed by plaintiffs do not constitute a selection procedure. No formula has been offered, let alone proven valid, to assess the relative importance of the "criteria" offered by the plaintiffs. The overall approach is wholly subjective and is as invalid as its individual components. [Pretrial Mem. at 46-47.]

147. Paragraph two of the Decree does not require the City to develop or use a job related selection procedure. It gives the City a limited option and limited defense should the City fail to meet the Decree's goals. This conclusion is compelled by the Decree's language and purpose, and is supported by the pre-Decree practices of the City and the Personnel Board. [Pretrial Mem. at 47-57.]

148. Plaintiffs have not established that any of the white plaintiffs are demonstrably better qualified than any of the black promotees based on the results of a valid, job related selection procedure. The failure of plaintiffs to identify a selection procedure, let alone one that is valid and job related, compels that conclusion.

149. The City Decree and the affirmative action plan for the promotion of blacks it created clearly contemplate the promotion of blacks who are demonstrably less qualified than competing whites. This conclusion is compelled by the wording and purposes of the Decree. *United States v. Jefferson County*, 28 Fair Emp. Prac. Cas. (BNA) 1834 (N.D. Ala. 1981). The 1981 statements of the parties to the Decree and the proceedings at the Fairness Hearing make clear that was also the contemporaneous understanding of the parties. *United States v. Jefferson County*, CA-75-P-0666-S, Fairness Hearing on August 2, 1981, Transcript at 63. [Pretrial Mem. at 8-21.]

150. The City Decree entered by this Court immunizes the City from liability for actions taken pursuant to it. See City Decree, ¶3, *United States v. Jefferson County*, 720 F.2d 1511, 33 FEP Cases 829 (11th Cir. 1983), recognizes that proposition. If there has been any doubt about that after Jefferson County, the Eleventh Circuit's subsequent decision in *Palmer v. District Board*, made clear that an action taken pursuant to a consent decree, not just one absolutely required by it, is not an act of discrimination under Title VII. [Defendants' Memorandum Addressed to the Burden of Proof and the "Mandated" Language in Jefferson County, "Burden of Proof Mem.," at 21-30.]

151. Race-conscious actions taken by an employer pursuant to a valid affirmative action plan are legal. *United States v. Jefferson County*, 720 F.2d 1511, 1518, 33 FEP Cases 829 (11th Cir. 1983); *Palmer v. District Board of Trustees*, 748 F.2d 595, 601, 36 FEP Cases 778 (11th Cir. 1984). [Pretrial Mem. at 22-25.]

152. The United States has consistently taken positions in this litigation inconsistent with positions it pressed so

vigorously in the litigation leading up to this Consent Decree. It has repeatedly breached its obligations to uphold the Decree and this Court's instructions, In Re: Birmingham Employment Litigation, 37 Fair Emp. Prac. Cas. 1, 8 (1985), that it act in accord with its obligations under the Decree. Its actions in these proceedings have been tantamount to an attack on the Decree's validity.

Subsidiary Conclusions of Law

153. Information or opinions not known to the decisionmaker are inadmissible as irrelevant.

154. Evidence of prior discrimination by the City of Birmingham is admissible to establish the factual basis for the legality of the City Decree, to show that seniority based criteria are subject as a result of prior underrepresentation, and that subjective criteria for evaluating promotions may be contemplated by the vestiges of such discrimination or the attitudes of those hired during such period.

155. Selection criteria which incorporate seniority or which are based on the subjective discretion or opinions of supervisors may not be considered in comparing black and white candidates under paragraph two of the City Decree.

U.S. v. JEFFERSON COUNTY

U.S. District Court,

Northern District of Alabama

UNITED STATES OF AMERICA v. JEFFERSON COUNTY, et al., No. 75-P-0666-S,* August 18, 1981

CIVIL RIGHTS ACT OF 1964

Goals and quotas contained in proposed consent decrees settling Title VII actions against county personnel board and city fire and police departments are well within permissible limits in that they do not preclude hiring or promotion of whites and males even for temporary period of time, and they are limited in time and effect in that they expire when percentage of blacks and women in particular job approximates percentage of blacks and women in civilian labor force, and decrees may be dissolved after six years.

Federal district court approves consent decrees settling Title VII actions against county personnel board and city fire and police departments for sex discrimination, even though there was no judicial finding of discrimination against female candidates for fire and police positions, where there was evidence of discrimination against women that rendered them ineligible for appointment to entry-level positions without regard to examination scores and foreclosed opportunities for departmental promotions.

Union consent to civil service rules changes contained in consent decree is unnecessary, where none of the rules subject to proposed changes is matter of contract with union.

Motion to intervene by firefighters union, which was permitted to be heard in opposition to consent decrees, in United

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* This opinion also covers two other cases consolidated for trial with 75-P-0666-S: Ensley Branch of the N.A.A.C.P. et al. v. Seibels et al., CA 74-Z-12-S; John W. Martin et al v. City of Birmingham et al., CA 74-Z-17-S. Attorneys for the Department of Justice have taken the principal role in presenting the various claims against the defendants.

States' Title VII action against county personnel board and city fire and police departments is untimely, where action has been pending for over five years and has been contested through two trials and one appeal.

Proceeding to determine whether to approve proposed consent decrees settling action under Title VII of Civil Rights Act of 1964 by United States against county personnel board and city fire and police departments, and motion by firefighter union to intervene. Decrees approved, and motion denied.

See 14 FEP Cases 670; and 22 FEP Cases 1207, 616 F.2d 812.

Richard J. Ritter and Theodore Merrit, U.S. Department of Justice, for plaintiff United States.

Susan W. Reeves and Stephen L. Spitz, Washington, D.C., for plaintiff Martin.

Oscar W. Adams, III, Birmingham, Ala., for Ensley Branch plaintiffs.

David P. Whiteside, Birmingham, Ala., for defendant Jefferson County Personnel Board.

James K. Baker, City Attorney for the City of Birmingham, and James P. Alexander, Birmingham, Ala., for defendant city.

Full Text of Opinion

POINTER, District Judge:—This litigation involves various charges of racial and sexual discrimination in governmental employment in Jefferson County, Alabama. Charged with engaging in a pattern and practice of discrimination are the Jefferson County Personnel Board and some fourteen separate county and municipal employers which participate in the multi-unit civil service system administered by the Personnel Board.

In January 1977, the court found that tests used by the Personnel Board to screen and rank applicants for employment as police officers and firefighters discriminated against blacks and were not shown to be job related under criterion-related validity studies. Those rulings, sub nom. Ensley Branch of the N.A.A.C.P. v. Seibels, 13 EPD ¶ 11,504, 14 FEP Cases 670, were upheld by the Fifth Circuit. See 616 F.2d 812, 22 FEP Cases 1207 (1980). The basic features of the civil service system are described in those opinions and will not be repeated here.

A second trial was held in August and October, 1979. At issue under F.R.Civ.P. Rule 42(b) were a number of other claims directed against practices of the Personnel Board. Under attack by the plaintiffs were eighteen other tests; various rules affecting promotional opportunities; the imposition of height, weight or educational requirements for certain jobs; and the restriction of some job announcements and certifications to persons of a particular sex. The Personnel Board defended by asserting that the challenged practices either had no adverse impact upon blacks or women or were nevertheless permissible under the employment discrimination laws.

During the period that the court was preparing its decision following the second trial, it was advised that the parties had commenced serious negotiations in an effort to resolve by settlement not only those issues already submitted to the court but also additional issues relating to the practices of some of the governmental employers, which had been severed under Rule 42(b) for yet an additional trial. The court was kept generally advised over the course of the following months—for the negotiations proved far more time-consuming than the parties had originally anticipated—of the general progress of the discussions, although not the details of any proposed settlement. Completion of the court's decision, many pages of which had already been drafted, was deferred in view of the prospect of settlement.

In June 1981 the parties tendered to the court two proposed consent decrees which would, if approved, settle the plaintiffs'

claims against both the Personnel Board and the City of Birmingham.[1] Tentative settlement classes for purposes of these decrees were formed, and notice of the proposed settlement and of the rights to be heard in opposition was given both by publication and by individual mailing to certain individuals. Objections to the proposed decrees were timely filed on behalf of three groups. A fourth objection by an individual, although untimely, was by consent also considered by the court at a fairness hearing under F.R.Civ.P. Rule 23 held on August 3, 1981.

For decision at this time is the question whether the proposed settlements should be approved. At the outset it should be noted that there is no contention or suggestion that the settlements are fraudulent or collusive. Rather, the issue is whether—considering the terms of the proposed decrees, the nature of the objections, the status of judicial proceedings, and the evidence before the court—the settlements should under the current state of the law be held to be unreasonable, unfair, inadequate, inequitable, illegal, unconstitutional, or against public policy. See United States v. City of Alexandria, 614 F.2d 1358, 22 FEP Cases 872 (5th Cir. 1980).

Although the decrees, which with attachments exceed 100 typewritten pages, would affect many employment practices and jobs, the objections are focused upon provisions relating to the certification, hiring, and promotion of persons in the police and fire departments of the City of Birmingham. Billy Gray, a white male lieutenant in the fire department, joined by the Birmingham Firefighters Association, objects to various segments of the decrees designed to increase the number of blacks and women in that department. Johnny Morris and six

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[1] Claims against other governmental employers serviced by the Personnel Board are not resolved by the proposed decrees but remain subject to further proceedings and trial.

other individuals, who presumably are white police officers,[2] object to provisions intended to increase the employment and promotion of minorities in the police department, while the Guardian Association—a group largely comprised of black officers—asserts that the decrees provide an inadequate remedy for past discrimination against blacks. James Miller, a white male, complains that his opportunities for employment as a police officer are unfairly curtailed by the present and proposed rules regarding that position. No other objections were made to the proposed decrees.

Gray, Morris, and those who joined in their objections assert that the settlements may accord preferential treatment to blacks and women with respect to future vacancies in the city's police and fire departments—a contention that can hardly be disputed. What is controverted is their argument that such favoritism would constitute an impermissible "reverse discrimination" in the absence of a finding or admission of prior discrimination by the city against those groups, particularly insofar as it might operate to benefit individuals who personally never were the victims of any discrimination by the city or to disadvantage those who personally never were the beneficiaries of such discrimination. Cf. University of California Regents v. Bakke, 438 U.S. 265, 17 FEP Cases 1000 (1978). Also in controversy is the position of Gray and the Firefighters that certain of the rules to be altered should be deemed as equivalent to the terms of a collectively bargained seniority system, which could not be modified without their consent. See Myers v. Gilman Paper Corp., 554 F.2d 837, 14 FEP Cases 218 (5th Cir. 1977); but cf. United States v. City of Miami, 614 F.2d 1322, 22 FEP Cases 846 (5th Cir. 1980), pet. for reh'g en banc granted and opinion vacated, 625 F.2d 1310, 23 FEP Cases 1510 (5th Cir. 1980).

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[2] Although written objections were timely filed on their behalf, Morris and the other six persons named in the document did not appear in person or by counsel to be heard in opposition to the settlement. The brief of the City of Birmingham suggests that these objectors are city police officers, and the nature of the objections filed under their name supports that inference.

The objectors are certainly correct in their underlying premise—that not all forms of "affirmative action" to aid minorities can be defended against an assertion of "reverse discrimination" and that the principal focus for remedial measures upon proof of discrimination is to provide appropriate relief for those who were the harmed by those acts or practices. The Supreme Court has, however, upheld as against an attack under Title VII of the Civil Rights Act of 1964 the voluntary adoption by a non-governmental employer of hiring goals and preferential treatment for minorities, even though these procedures would benefit persons never discriminated against by the employer and even though indeed there had been no showing of any discrimination by that employer. United Steelworkers of America v. Weber, 443 U.S. 193, 20 FEP Cases 1 (1979), rev'g 563 F.2d 216, 16 FEP Cases 1 (5th Cir. 1977). The Courts of Appeals have moreover upheld the use of goals and quotas for governmental and non-governmental employers, both in the context of judicial remedies after proof of discrimination and in the form of settlement of unproven claims of discrimination, not only when attacked under Title VII but also when challenged under the Fourteenth Amendment and 42 U.S.C. §§ 1981 and 1983. See United States v. City of Alexandria, 614 F.2d 1358, 22 FEP Cases 872 (5th Cir. 1980); Detroit Police Officers' Ass'n v. Young, 608 F.2d 671, 20 FEP Cases 1728 (6th Cir. 1979), cert. denied, 452 U.S. 938, 25 FEP Cases 1683 (June 15, 1981); Valentine v. Smith, 654 F.2d 503, 50 LW 2066, 26 FEP Cases 518 (8th Cir., July 21, 1981); Setser v. Novack Investment Co., 657 F.2d 962, 50 LW 2066, 26 FEP Cases 513 (8th Cir., July 21, 1981) (en banc); Local Union No. 35 v. City of Hartford, 625 F.2d 416, 22 FEP Cases 1786 (2nd Cir. 1980); cf. Talbert v. City of Richmond, 648 F.2d 925, 25 FEP Cases 953 (4th Cir. 1981). Also see pre-Bakke cases cited in the City of Miami opinion, 614 F.2d at 1335-36.

[1] The goals and quotas here under attack are well within the limits upheld as permissible in these decisions. First, they do not preclude the hiring or promotion of whites and males

even for a temporary period of time.[3] Rather, the relevant parts of the proposed decrees provide, in summary, as follows: (1) the Personnel Board will certify black applicants for entry-level positions as police officers and firefighters as earlier directed by this court after trial (and as affirmed by the Fifth Circuit), i.e., basically at a rate commensurate with the relative percentage of black applicants; (2) the Board will attempt to certify women for these entry-level positions at a rate commensurate with the relative percentage of women applicants or, if higher, at the rate of 1 woman to 3 men for police officer and of 1 woman to 9 men for firefighter; (3) the Board will attempt to certify black and female candidates for higher-level positions in the departments in a manner as will permit the city to attain its own goals and, where necessary for this purpose, can certify more than the top three candidates found eligible by it; (4) subject to the availability of qualified candidates, the city agrees to hire into these equalize level positions blacks and women at a rate commensurate with the percentage of black and female applicants or, if higher, at the rate of 1 black to 1 white, at the rate of 1 woman to 3 men for police officer, and at the approximate rate of 1 woman to 6 men for firefighter; (5) subject to the availability of qualified candidates, the city agrees to promote blacks to police sergeant and fire lieutenant at the rate of 1 black to 1 white, to promote blacks to two of the next four police lieutenant vacancies, to promote a black to one of the next two police captain vacancies and to one of the next two fire captain vacancies, and to promote blacks to subsequent vacancies in the higher level positions in the departments at twice the percentage of blacks in the positions from which promotions are traditionally made; and, (6) subject to the availability of qualified candidates, the city agrees to promote

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[3] The proposal of the Guardian Association would freeze all promotions of whites in the police department until blacks were appointed to 4 positions as captain, 8 as lieutenant, and to 25% of the sergeants. It would also call for the hiring of 3 blacks for each white as police officer. Such draconian measures, even if permissible as a part of a judicial remedy, can hardly be viewed as necessary ingredients of a fair and adequate settlement.

women to police sergeant at the rate of 1 woman to 3 men and to promote women to higher level positions in the police department at the percentage of women in the positions from which such promotions are traditionally made. For purposes of these provisions, the certification, hiring, or promotion of a black woman is counted both towards the goal for blacks and towards that for women.

Study of these provisions indicates that, while comprehensive, they nevertheless preserve a substantial opportunity for whites and males to be hired or promoted in the two departments. Moreover, the goals of the city are in the settlement expressly made subject to the caveat that the decree is not to be interpreted as requiring the hiring or promotion of a person who is not qualified or of a person who is demonstrably less qualified according to a job- related selection procedure.

Secondly, these provisions for potentially preferential treatment are limited both in time and in effect. They are to expire when the percentage of blacks or women in a particular job approximates the percentage of blacks or women, respectively, in civilian labor force in Jefferson County, Alabama. Additionally, provisions of the settlement provide a mechanism for the decrees to be dissolved after a period of six years. It will be noted that the four criteria for approval of an affirmative action program set forth by the Eighth Circuit in Valentine v. Smith, 654 F.2d 503, 50 LW 2066, 26 FEP Cases 518 (July 21, 1981), are clearly met in the present case.

The objectors treat this case as one in which discrimination on the basis of race or sex has not been established. That is only partially true, at least as it relates to positions in the police and fire departments. This court at the first trial found—and the Fifth Circuit agreed—that blacks applying for jobs as police officers and firefighters were discriminated against by the tests used by the Personnel Board to screen and rank applicants. The evidence presented at the second trial established, at the .01 level of statistical significance, that blacks were adversely affected by the exam used by the Personnel Board to screen and

rank applicants for the position of police sergeant. Since governmental employers such as the City of Birmingham have been limited by state law to selecting candidates from among those certified by the Board, one would hardly be surprised to find that the process as a whole has had an adverse effect upon blacks seeking employment as Birmingham police officers, police sergeants, or firefighters—regardless of whether or not there was any actual bias on the part of selecting officials of the City. A natural consequence of discrimination against blacks at entry-level positions in the police and fire departments would be to limit their opportunities for promotion to higher levels in the departments.

Employment statistics for Birmingham's police and fire departments as of July 21, 1981, certainly lend support to the claim made in this litigation against the City—that, notwithstanding this court's directions in 1977 with respect to certifications by the Personnel Board for the entry-level police officer and firefighters positions and despite the City's adoption of a "fair hiring ordinance" and of affirmative action plans, the effects of past discrimination against blacks persist. According to those figures, 79 of the 480 police officers are black, 3 of the 131 police sergeants are black, and none of the 40 police lieutenants and captains are black. In the fire department, 42 of the 453 firefighters are black, and none of the 140 lieutenants, captains, and battalion chiefs are black.

[2] There has been no judicial finding of discrimination against female candidates for positions in Birmingham's police and fire departments, nor indeed was there at the first trial any contention that the examinations administered by the Personnel Board for those positions had any adverse impact upon women to whom the tests were administered. However, evidence at the second trial—as to which no findings have yet been entered—reflected a more immediate form of discrimination against women who might be interested in such positions, rendering them ineligible for appointment to the basic entry-level positions without regard to examination scores. Disqualification from the key entry-level positions also resulted in foreclosing the opportunities for departmental promotions.

For many years announcements for positions as police patrolman and firefighter were restricted to males only. A separate position of traffic citation officer, restricted to females, was created for the City of Birmingham; but it provided no promotional opportunities within the department. In 1970 the separate classification of policewoman was established for Birmingham. Not until late 1974—over two years after Title VII became applicable to governmental employment—did the Personnel Board delete the male-only restriction for firefighters and combine the positions of patrolman and policewoman. Minimum height and weight requirements for police officers and firefighters continued to be specified by the Board to the time of the second trial of this case. Presumably in view of the intervening Supreme Court decision in Dothard v. Rawlinson, 433 U.S. 321, 15 FEP Cases 10 (1977), the Personnel Board did not at the second trial, at which these explicit and implicit barriers to employment of women were challenged, seek to defend these practices.

The impact of these restrictions can be seen in the employment statistics for Birmingham's police and fire departments as of July 21, 1981. According to these figures, women constitute 53 of the 480 police officers, 3 of the 131 police sergeants, none of the 40 police lieutenants and captains, none of the 453 firefighters, and none of the 140 lieutenants, captains, and battalion chiefs in the fire department.

While the only judicial finding of discrimination thus far entered has been with respect to the effect upon black applicants of the Personnel Board's tests for police officer and firefighter, it can hardly be doubted that there is more than ample reason for the Personnel Board and the City of Birmingham to be concerned that they would be in time held liable for discrimination against blacks at higher level positions in the police and fire departments and for discrimination against women at all levels in those departments. The proposed consent decrees, by way of settlement for such potential liability, provide appropriate corrective measures reasonably commensurate with the nature and extent of the indicated discrimination. Moreover, as earlier noted, the remedial steps

are limited in duration, expiring as particular positions generally reflect the racial and sexual composition of the labor market in the county as a whole; they provide substantial opportunity for employment and advancement of whites and males; they do not require the selection of blacks or women who are unqualified or who are demonstrably less qualified than their competitors. The goals for certification, employment, and promotion as outlined in the proposed decrees, together with various related changes which complement those objectives—such as elimination of height and weight requirements, and the elimination or reduction of certain time-in-grade requirements for promotions—are due to be approved by this court under the teaching of United States v. City of Alexandria, 614 F.2d 1358, 22 FEP Cases 872 (5th Cir. 1980).

[3] The Firefighters Association has argued that, given the vacating by the Fifth Circuit of the panel decision in the City of Miami case, 614 F.2d 1322, 22 FEP Cases 846, no changes in the civil service rules should be approved without its consent as a union, citing Myers v. Gilman Paper Corp., 544 F.2d 837, 14 FEP Cases 218 (5th Cir. 1977). The point, however, is that—unlike the situation in the City of Miami case—none of the rules to be altered under the proposed consent decree is a matter of contract with the union. Rather, the case *sub judice* is like that involved in the City of Alexandria, a decision left intact when rehearing was granted in the City of Miami decision. One may reasonably assume that en banc rehearing was granted to consider the consequences upon a proposed settlement of non-concurrence of a union which was party to collectively-bargained rules, and not for the purpose of reconsidering the basic rules governing judicial approval of proposed settlements.

The Firefighters Association has also attacked the portions of the proposed decrees that would eliminate the requirement that applicants for the firefighter position have a high school diploma (or GED equivalent) and the provision under which the City of Birmingham would agree that applicants would not automatically be disqualified by virtue of a prior criminal conviction or arrest. The Association has not, however,

demonstrated why this court should prevent the Personnel Board or Birmingham from making those changes if—whether to aid in settling this litigation or otherwise—they want to do so. Moreover, it should be noted that the elimination of the educational requirement for firefighters is not absolute—under the decree such a requirement can be imposed by the Personnel Board upon proof that it has no adverse impact because of race or sex or that it is valid under the *Uniform Guidelines*. Nor does the proposed decree prohibit Birmingham from considering for particular positions, such as that of firefighter or police officer, the effect of a criminal record—it rather states that in such circumstances the city shall consider the nature of the position, the nature and age of the crime, and the success or failure of rehabilitation efforts.

The court has reviewed with care the provisions of the proposed settlements to which objections have been raised, as well as those portions to which no objection has been raised. Whether or not the proposed decree would in each instance correspond to some finding of discrimination which this court might make or provide the same remedial relief which this court might order is not the question. The settlement represents a fair, adequate and reasonable compromise of the issues between the parties to which it is addressed and is not inequitable, unconstitutional, or otherwise against public policy. Accordingly, the court's approval will be manifested by appropriate orders adopting the decrees tendered.

[4] One further matter should be addressed: the motion to intervene filed by the Firefighters Association, Gray, and Sullivan subsequent to the hearing on the settlement. This litigation has been pending for over five years and has been vigorously contested by the existing parties through two trials and one appeal. While the Firefighters and Gray were permitted to be heard in opposition to the settlement, and the court fully considered their objections, intervention at this time as parties to the litigation is clearly untimely and must be denied.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

UNITED STATES OF AMERICA, *Plaintiff*, v. JEFFERSON COUNTY, *et al.*, *Defendants*.	CIVIL ACTION NO. 75-P-0666-S
JOHN W. MARTIN, *et al.*, *Plaintiffs*, v. CITY OF BIRMINGHAM, *et al.*, *Defendants*.	CIVIL ACTION NO. 74-Z-17-S
ENSLEY BRANCH OF THE N.A.A.C.P., *et al.*, *Plaintiffs*, v. GEORGE SEIBELS, *et al.*, *Defendants*.	CIVIL ACTION NO. 74-Z-12-S

CONSENT DECREE WITH THE CITY OF BIRMINGHAM

The plaintiffs filed their complaints in these consolidated actions against the City of Birmingham and others to enforce the provisions of Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, the State and Local Fiscal Assistance Act of 1972, as amended,

31 U.S.C. §1221, *et seq.*, the Omnibus Crime Control and Safe Streets Act of 1968, as amended, 42 U.S.C. §3766(c)(1), the Civil Rights Acts of 1866 and 1871, 42 U.S.C. §1981, 42 U.S.C. § 1983, and the Fourteenth Amendment to the Constitution of the United States. In their complaints, the plaintiffs alleged that the City of Birmingham and the other named defendants had engaged in a pattern or practice of discrimination based on race and sex with respect to recruitment, hiring, assignment, promotion, discipline, and other terms and conditions of employment. The City of Birmingham has denied the allegations in the plaintiffs' complaints.

The parties to this Consent Decree are the plaintiffs in the consolidated actions captioned above and two of the named defendants in those actions, the City of Birmingham and Richard Arrington, acting in his official capacity as the Mayor of the City of Birmingham. By entering into this Consent Decree the parties express their desire to avoid the burdens and expense of any further litigation in these actions and to insure that any disadvantages to blacks and women that may have resulted from any past discrimination against them are remedied so that equal employment opportunities will be provided to all. The parties waive any findings of fact and conclusions of law on all outstanding issues solely pertaining to the City of Birmingham except for costs and attorneys' fees. The parties will seek to reach agreement on the amount of attorneys' fees and costs for the private plaintiffs in these consolidated actions. If agreement cannot be reached on the amount of such fees and costs, this matter shall be submitted to the Court for determination. The United States waives any entitlement it may have to recovery of costs. This Decree shall not constitute an adjudication or admission by the City of Birmingham or others signatory to this Decree of any violation of law, executive order or regulations. The parties accept this agreement as final and binding among the parties signatory hereto as to the issues resolved herein.

The plaintiffs recognize the adoption by the City of Birmingham of Sections 2-4-51 through 2-4-56 of the Birmingham City Code ("the fair hiring ordinance"), the annual

preparation and implementation by each department of the City of Birmingham of affirmative action plans in accordance with the fair hiring ordinance, and the issuance by the Mayor of the City of Birmingham of Administrative Directive AA-1 and Executive Order 17-77, as evidence of good faith efforts by the City of Birmingham to take meaningful affirmative action to increase minority and female participation throughout the City's work force.

Now therefore, on the basis of the foregoing representations of the plaintiffs, the City of Birmingham and the Mayor of the City of Birmingham, and all trial proceedings and discovery filed herein to date, it is hereby ORDERED, ADJUDGED, and DECREED as follows:

I. GENERAL PROVISIONS

1. The defendant City of Birmingham, its officials, agents, employees, and all persons in active concert or participation with them in the performance of city functions (herein collectively referred to as the City) are permanently enjoined and restrained from engaging in any act or practice which has the purpose or effect of unlawfully discriminating against any employee of, or any applicant or prospective applicant with, the City of Birmingham because of such individual's race, color or sex. Specifically, the City shall not discriminate on the basis of race, color or sex in recruiting, hiring, promotion, upgrading, training, job assignments, discharge or other disciplinary measures, compensation, or other terms and conditions or privileges of employment. Further, the City shall not retaliate against or in any way take action against any person because that person opposes or has opposed alleged discriminatory policies or practices in the City of Birmingham, or because of that person's participation in or cooperation with the investigation and trial of these actions, or in any proceedings therein.

2. Nothing herein shall be interpreted as requiring the City to hire unnecessary personnel, or to hire, transfer, or promote a person who is not qualified, or to hire, transfer or promote a less qualified person, in preference to a person who is

demonstrably better qualified based upon the results of a job related selection procedure. Nothing herein shall prohibit the City from discharging or disciplining employees for just cause in accordance with applicable law, provided however that any such actions are taken and executed in a non-discriminatory manner without regard to race or sex, and are otherwise consistent and in conformity with the City's obligations under this Decree.

3. Remedial actions and practices required by the terms of, or permitted to effectuate and carry out the purposes of, this Consent Decree shall not be deemed discriminatory within the meaning of paragraph 1 above or the provisions of 42 U.S.C. 2000e-2(h), (j), and the parties hereto agree that they shall individually and jointly defend the lawfulness of such remedial measures in the event of challenge by any other party to this litigation or by any other person or party who may seek to challenge such remedial measures through intervention or collateral attack. If any collateral lawsuit involving this Consent Decree arises in state court, then the City shall notify counsel for the plaintiffs and remove such action to the United States District Court.

4. In the event plaintiffs seek to enforce any provision of this Decree they shall provide notice of their intentions to:

City Attorney
City of Birmingham
600 City Hall
Birmingham, Alabama 35203

Such notice shall state, with reasonable particularity, the nature of the alleged violation and the relief sought. The parties shall have a period of thirty (30) days within which to resolve the matter informally. If the parties fail to resolve the matter plaintiffs may, upon expiration of the thirty-day period, apply to the Court for an appropriate enforcement order.

II. GOALS

5. In order to correct the effects of any under-representation of blacks and women in the City's workforce caused by any

alleged prior discriminatory employment practices, the City agrees to adopt as a long term goal, subject to the availability of qualified applicants, the employment of blacks and women in each job classification in each department of the City of Birmingham in percentages which approximate their respective percentages in the civilian labor force of Jefferson County as defined by the 1970 Federal Census. As a means of achieving the long term goal established by this Decree the City may prefer residents of the City for appointment. This long term goal shall be appropriately modified to reflect any changes in the racial and sexual composition of the applicable civilian labor force as reflected by the 1980 Census. The parties also preserve the right to adjust, through agreement and subject to the approval of the Court, any of the goals provided by this Decree where it can be shown that a professional degree, license or certificate is required to perform the duties of any particular job or jobs in the City's workforce and that blacks and/or women hold such degrees, licenses or certificates in percentage terms which are inconsistent with the goals provided.

A. Goals for Blacks

6. In order to achieve the long term goal in the job classifications set forth below, and subject to the availability of qualified black applicants for those jobs, the City shall establish and attempt to achieve an annual goal of making probational appointments to vacancies in permanent, full-time positions in the classified service of black applicants at the rates set forth below or at the rate of black representation among applicants, whichever is higher.

Job Classification	Interim Annual Goal
1. Account Clerk	50%
2. Automotive Mechanic	50%
3. Building Inspector	33%
4. Construction Equipment Operator	50%
5. Firefighter	50%
6. Gardener	50%

7.	Heavy Equipment Operator	50%
8.	Labor Supervisor	50%
9.	Police Officer	50%
10.	Police Radio Dispatcher	50%
11.	Police Sergeant	50%
12.	Fire Lieutenant	50%
13.	Public Works Supervisor	50%
14.	Construction Supervisor	50%
15.	Refuse Truck Driver	50%
16.	Revenue Examiner	50%
17.	Secretary	50%
18.	Senior Clerk	50%
19.	Senior Sanitation Inspector	33%
20.	Zookeeper	50%

7. In order to achieve the long term goal in the job classifications within the job groups identified below, and subject to the availability of qualified black applicants for the jobs in those job groups, the City shall establish and attempt to achieve an annual goal of making probational appointments to vacancies in permanent, full-time positions in the classified service of black applicants at the rates set forth below or at the rate of black representation among applicants, whichever is higher. Attached as Appendix A to this Consent Decree is a listing of each of the job classifications included within each of the job groups set forth in this paragraph.

Job Group	**Interim Annual Goal**
Group I—Engineering Department	
1) Professionals	25%
2) Technicians	25%
Group II—Finance Department	
1) Professionals	25%
2) Technicians	

Group III—Inspection Services Department

1) Technicians (other than Building Inspector)	25%
2) Skilled Craft Workers	25%

Group IV—Traffic Engineering Department

1) Technicians	25%

Group V—Office of Housing

1) Professionals	25%

8. In order to correct the effects of any past under-representation of blacks in the Police and Fire departments of the City of Birmingham, and to further insure the achievement of the long term goal established by this Decree, the City shall, subject to the availability of qualified black candidates, promote at least two (2) blacks to the next four (4) lieutenant vacancies in the Police Department and shall promote at least one (1) black to the next two (2) captain vacancies in the Police Department. The City shall, subject to the availability of qualified black candidates, promote at least one (1) black to the next two (2) captain vacancies in the Fire department. Thereafter, and until the long term goal of this Decree is met in the Police and Fire departments, the City shall seek to achieve the interim goals of promoting blacks to vacancies in lieutenant and captain positions in the Police Department and to vacancies in the positions of captain and battalion chief in the Fire Department at twice the black percentage representation in the job classifications from which promotional candidates are traditionally selected for those jobs.

B. Goals for Women

9a. In order to overcome the effects of any prior under-representation of women in the job classifications listed below and to correct for the effects of the Personnel Board's prior practice of restricting its job announcements in many of these positions to "males only", the City shall establish and attempt to meet an annual interim goal of making probational

appointments of female applicants to vacancies in permanent, full-time positions in the classified service in the job groups listed below at the rates set forth next to each job group or at the rate of female representation among applicants, whichever is higher. Attached as Appendix B to this Consent Decree is a listing of each of the job classifications included within each of the job groups set forth in this paragraph.

Job Group	**Interim Annual Goal**
Group I—Police Department	25%
Protective Services (Police Officer)	
Group II—Police Department	25%
Protective Services (Police Sergeant)	
Group III—Fire Department	15%
Protective Services	
Group IV—Engineering Department	30%
Professionals Technicians Para-professionals	
Group V—Inspection Services Department	20%
Professionals Technicians Skilled Craft Workers	
Group VI—Municipal Garage	20%
Skilled Craft Workers Service/Maintenance Workers	
Group VII—Office of Housing	20%
Professionals	
Group VIII—Streets & Sanitation	20%
Technicians Service/Maintenance Workers	

Group IX—Traffic Engineering	30%
Professionals	
Technicians	
Skilled Craft Workers	
Service/Maintenance Workers	
Group X—Parks & Recreation	20%
Skilled Craft Workers	
Service/Maintenance Workers	
Group XI—Parking Authority	30%
Protective Services	

9b. With respect to promotions to sworn positions in the police department above the rank of sergeant, the City shall, subject to the availability of qualified female applicants, seek to insure that women are promoted to such positions in percentages which are approximately equivalent to their percentage representation in the job classifications from which promotional candidates are traditionally selected.

C. Implementation of Goals

10a. In order further to insure the possibility of achieving the goals for blacks and women set forth in this Decree, the City shall request the Personnel Board selectively to certify to the City for appointment qualified blacks and females whenever such action is necessary to provide the City with a certification list that contains sufficient numbers of blacks and females to meet the goals set forth in this Decree. More specifically, in cases where candidates have been found unqualified or unavailable for appointment, the City shall request that the Personnel Board certify sufficient numbers of qualified blacks and women to meet the goals of this Decree. In this regard the City may request that the Personnel Board certify qualified blacks and females who are not incumbent employees of the City of Birmingham. In determining the City's compliance with the goals of this Decree, the appointment of a black female shall count toward both black and female hiring and promotion goals.

10b. In the event the Personnel Board declines, or is unable, to furnish lists containing qualified blacks or females, or in the event the Personnel Board declines to eliminate from its consideration of eligibles non-validated promotional potential ratings, the City, notwithstanding any state or local law, shall take whatever actions are required to comply with the terms of this Decree. Such actions may include, but are not limited to:

(i) Directly recruiting blacks or females, for the purpose of supplementing any non-conforming list furnished by the Personnel Board.

(ii) Considering existing black and female City employees for promotion, whether or not such candidate was certified by the Personnel Board and supplementing any such non-conforming list furnished by the Personnel Board with such persons as are deemed qualified by the City.

III. AFFIRMATIVE ACTION PLANS

11. On an annual basis for five years after entry of this Decree, each department of the City shall submit to the Office of the Mayor, in writing, an affirmative action plan designed to increase the employment and promotions of blacks and women in the respective department, and to otherwise promote the implementation of this Decree. The plan shall set forth the affirmative steps to be taken to increase the employment and upgrading of blacks and women.

12. A copy of the affirmative action plan for each department, when approved by the Mayor, shall be posted in a conspicuous and prominent place in the main office of each department of the City, and a copy of each plan shall be prominently posted by the Director of Personnel in a public area in City Hall.

13. Each department head shall submit to the Mayor semi-annual evaluation reports of the department's affirmative action plan. The report shall also include a review of the department's progress in achieving the specific goals of this Decree and of the department's affirmative action plan, noting the goals which

were achieved and those not yet achieved, the reason for any failure to achieve goals, and the remedial action being taken to overcome any such failure.

IV. RECRUITMENT

14. The City shall continue to develop and reassess its present affirmative recruitment program designed to inform blacks and women of job opportunities with the City for the purpose of securing sufficient qualified applicants to enable the City to meet the hiring goals set forth herein. The recruitment program shall include maintaining contacts with area high schools, technical and vocational schools, colleges, and organizations which have traditionally expressed an interest in providing minority and female applicants or which indicate such interest in the future, and informing them of employment opportunities with the City. In addition, where appropriate, advertising of employment opportunities shall be placed with or in advertising media primarily directed to black and female audiences for the purpose of emphasizing to blacks and women the availability of employment opportunities with the City. As part of its recruitment program the City shall utilize black and female recruiters for the Police and Fire Departments.

V. JOB POSTING

15. The City shall inform its employees of all opportunities for promotion or transfer. The City shall insure that all written announcements received from the Personnel Board for hiring, promotion and training opportunities with the City are made available to all of its employees reasonably in advance of any scheduled examinations or training for such positions. Such announcements shall be posted in conspicuous places so that reasonable notice is given to the City's employees of such employment opportunities.

16. Notices of vacancies within a department in either permanent, part-time or temporary positions shall be posted separately and in conspicuous places from notices of vacancies in other departments. With respect to promotions and/or training opportunities in the Police, Fire, and Streets and Sanitation departments, the City shall insure that written notification of

promotion or training opportunities in jobs in those departments are contained on separate bulletin boards and in conspicuous places at each precinct, fire house or division of such departments. The City shall also seek to insure that such announcements remain on the bulletin board for the specified period of time, and that they are not taken down or otherwise tampered with by unauthorized persons.

VI. SEX RESTRICTIONS IN JOB ANNOUNCEMENTS AND CERTIFICATIONS

17. The City shall not request that the Personnel Board restrict any job announcements or certifications on the basis of sex except where, pursuant to a proper validation study, gender is determined to constitute a bona fide occupational qualification within the meaning of Section 703(e) of Title VII for the job(s) listed in such announcements or certifications, and such determination is approved in writing by the United States. If such approval is not granted, the City reserves the right upon proper motion to petition the Court for approval of the determination.

VII. HEIGHT-WEIGHT REQUIREMENTS

18. The City shall not use or follow any minimum height or weight requirements which have an adverse impact against blacks or women as selection criteria for any classified service position, nor shall it abide by any such requirements if they are instituted and administered by the Personnel Board.

VIII. ELIGIBILITY TO APPLY FOR PROMOTION TO CERTAIN JOBS

19a. The City shall not require police officers to serve more than three years uninterrupted service in rank (or two years uninterrupted service in rank for candidates who have two years of college credits) in order to be eligible to take the promotional examination for police sergeant, nor shall it require police sergeants to serve more than two years uninterrupted service in rank in order to be eligible to take the promotional examination for police lieutenant. Employees who have obtained permanent status as police lieutenant shall not be deemed ineligible for

promotion to the next higher rank based upon any minimum length of service or time in rank.

19b. The City shall not require firefighters to serve more than two years uninterrupted service in rank in order to be eligible to take the promotional examination for the position of fire lieutenant. Employees who have obtained permanent status as fire lieutenant or fire captain shall not be deemed ineligible for promotion to the next higher rank based upon any minimum length of service or time in rank.

19c. For purposes of subparagraphs a and b the term "uninterrupted" service shall include any time spent as a probationary employee.

20. In order to be eligible to take the promotional examinations for the positions of public works supervisor or construction supervisor, an employee must have permanent status as a truck driver, refuse truck driver, labor supervisor, heavy equipment operator or construction equipment operator. In order to be eligible to take the promotional examination for the position of sanitation inspector, an employee must have permanent status as a truck driver or semi-skilled laborer.

21. Any employee who has worked full-time in an unclassified laborer position for twelve consecutive months shall be eligible to apply to take the promotional examinations for the following classifications: semi-skilled laborer, truck driver, refuse truck driver, equipment service worker, automotive mechanic helper. As used in this paragraph, the term laborer shall include the classification of building service worker, laborer, and refuse collector.

22. Any employee who has obtained permanent status as a semi-skilled laborer or truck driver shall be eligible to apply to take the promotional examinations for the following classifications: truck driver, refuse truck driver, labor supervisor, heavy equipment operator, equipment service worker, automotive mechanic helper.

23. Any employee who has obtained permanent status as a truck driver, heavy equipment operator, refuse truck driver,

or labor supervisor shall be eligible to apply to take the promotional examination for the classification of construction equipment operator.

IX. PROMOTIONAL POTENTIAL RATINGS

24. The City may continue to use the Personnel Board's current promotional potential rating system in departments where it is shown to have no adverse impact. The City shall discontinue the use of the Personnel Board's current promotional potential rating system in the following departments in which departments such ratings have been demonstrated to have had an adverse impact on blacks: Streets and Sanitation, Police, Fire, Parks and Recreation.

25. The City further agrees to discontinue the use of the Personnel Board's current promotional potential rating system to determine eligibility for promotion in any other department where, based upon any two successive rating cycles (one cycle consisting of 6 months), there is evidence of adverse impact against blacks. In determining adverse impact under this subpart the parties agree to rely upon Section 4D of the Uniform Guidelines.

X. BACKGROUND INVESTIGATIONS

26. Background investigations shall be conducted in such a manner so as not unlawfully to discriminate on the basis of race or sex. Applicants for employment shall not be disqualified automatically on the basis of an arrest or conviction record, a military discharge that is less than honorable, or a poor credit rating. In considering the effect of a criminal conviction upon an applicant's qualifications, the City shall consider at least the following factors: (1) the nature of the position the applicant is seeking; (2) the nature of the crime; (3) the period of time elapsed since the conviction; and (4) the success or failure of rehabilitation efforts.

27. The City shall establish a written policy concerning background investigations within the Police Department within 90 days after this Decree is entered. As part of that policy, the Police Department shall provide applicants who have been

rejected on the basis of the background investigation written notice of the specific reason(s) for their rejection. An applicant who has received such notice shall be allowed ten (10) days to respond orally or in writing and to provide relevant information concerning the basis for rejection. The City shall insure that such oral or written response and relevant information is reviewed by an individual(s) who did not participate in the applicant's initial background investigation, and that this review shall occur before the rejection becomes final. The Department's background investigation policy shall be reviewed periodically to insure that it is administered in a nondiscriminatory manner, and that any components, aspects or elements of the background investigation process which result in a disproportionate disqualification of blacks or women are either eliminated or shown to be job related in accordance with the requirements of the *Uniform Guidelines*. The policy shall also provide that any black or female applicant rejected for a job by reason of an adverse background investigation shall be replaced on the next certification list for such job by an applicant of the same race or gender.

XI. SUPERVISORY INSTRUCTION

28. The City shall inform supervisory personnel that the City shall not discriminate against or harass any employee or potential employee on the basis of race or sex. In addition, the City will instruct such personnel about their responsibility in regard to equal employment opportunity and affirmative action. Supervisory personnel will be evaluated, in part, on the basis of their equal employment opportunity and affirmative action efforts and results, as well as their cooperation with the Affirmative Action Officer.

XII. DISMISSALS FROM THE POLICE AND FIRE TRAINING ACADEMIES

29. The City agrees that prior to the dismissal of a black or female from the police or fire training academy, it shall notify any such black or female in writing of the specific reason(s) that person is subject to dismissal from the academy, and he or she shall be given an opportunity to respond orally or in writing

within 10 days to responsible training academy officials with respect to any matters which concern their academy performance. Copies of any correspondence, notes, memoranda or recordings concerning any matters covered by this paragraph shall be retained by the City and shall be available for inspection by attorneys for the plaintiffs upon request.

XIII. FACILITIES

30. The parties recognize that the City has engaged and is continuing to engage in affirmative efforts to eliminate vestiges of racial segregation in employees' facilities. The City hereby agrees to take steps to insure that such facilities will be maintained in a racially integrated fashion in the future.

XIV. AFFIRMATIVE ACTION OFFICER

31. The City shall appoint an Affirmative Action Officer who shall have the following responsibilities:

(a) Advise black and female employees of the terms of this decree;

(b) Post his or her office hours and location and copies of this Decree in conspicuous places within each department or operational unit of the City;

(c) Receive and investigate complaints of race and sex discrimination and conciliate such complaints when appropriate, and notwithstanding any other provisions of law, establish a written procedure which shall govern such complaints;

(d) Maintain a complete record of all actions taken in pursuit of the duties outlined above, including all correspondence directed to or from the City of Birmingham with respect to any complaints or investigations undertaken pursuant to this Consent Decree and any investigatory files; and

(e) To review, prior to final selection, a department head's written justification for failure to select certified black or female applicants in jobs in which blacks or females are underrepresented. The Affirmative Action

Officer shall submit his or her written comments together with the appointing authority's written justification to the Office of the Mayor, prior to final selection.

XV. AFFIRMATIVE ACTION COMMITTEES

32. The City shall appoint separate affirmative action committees for the Police Department, the Fire Department, and the Streets and Sanitation Department. Each committee shall be composed of not less than 3 nor more than 5 members who are City employees, and who may be either incumbents in their respective departments or individuals selected from outside such departments. Such committees shall meet periodically to review the job assignment and disciplinary policies in their respective departments in order to insure that such policies are maintained and administered in a manner that does not unlawfully discriminate against any employee because of race or sex. Such committees shall report quarterly (or more than quarterly if required by specific matters) to the mayor or his designee. In appointing the members of such committees the City shall insure that there are at least two blacks and one female among the members of each such committee. Each committee member shall be compensated for committee work at the same rate the committee member receives in his or her job with the City.

XVI. INDIVIDUAL RELIEF

A. Relief for Named Private Plaintiffs

33. The individual named plaintiffs in the *Martin* case, (filed on January 7, 1974) are John W. Martin, Major Florence, Ida McGruder, Sam Coar, Wanda Thomas, Eugene Thomas, and Charles Howard. The City of Birmingham agrees to provide the following relief for the named plaintiffs in the *Martin* case, without awaiting any further action by the Personnel Board.

a. Ida McGruder alleged in the complaint in the *Martin* case that the City of Birmingham discriminated against her on the basis of race in failing to hire her to a position as a key punch operator after she was certified to that position as qualified by the Personnel Board on several occasions in 1973. The position of key punch operator is now known as data entry operator. The

City of Birmingham agrees to hire Ida McGruder to the first data entry operator vacancy which occurs after the final approval of this Decree by this Court. Ms. McGruder's remedial City seniority date and adjusted classification seniority date shall be May 1, 1973. Ms. McGruder shall also receive back pay relief as provided in paragraph 34a of this Decree. At the time Ms. McGruder fills a data entry operator vacancy with the City, she shall be paid at the highest pay step for that classification.

b. Major Florence claims he was discriminated against on the basis of race in that he has been denied promotional opportunities in the Streets and Sanitation Department by the City and the Personnel Board. The City agrees to promote Mr. Florence to the position of public works supervisor as provided in paragraph 47a and Appendix C of this Decree. Mr. Florence's adjusted classification seniority date for public works supervisor shall be June 3, 1974. Mr. Florence shall also receive back pay relief as provided by paragraph 34a of this Decree.

c. Sam Coar alleged in the complaint that he was discriminatorily discharged from the Streets and Sanitation Department of the City of Birmingham in 1972 after 8 years of employment as an unclassified laborer. The City of Birmingham agrees to hire Sam Coar to a position as a truck driver in the Streets and Sanitation Department for the first truck driver vacancy which occurs after final approval of this Consent Decree by this Court. At the time Mr. Coar fills a truck driver vacancy with the City, he shall be paid at the highest step for that classification. Mr. Coar's remedial city seniority date shall be March 3, 1964, the date Mr. Coar entered the unclassified service of the City of Birmingham. Mr. Coar's adjusted classification seniority date for truck driver shall be January 1, 1973. Mr. Coar shall also receive back pay relief pursuant to paragraph 34a of this Decree.

d. Eugene Thomas alleged in the complaint that he was denied a position as a police officer with the City of Birmingham because of race. The City of Birmingham agrees to hire Mr. Thomas for the first police officer vacancy which occurs after final approval of this Decree, provided that

Mr. Thomas satisfactorily passes the standard physical examination for the police officer position. Mr. Thomas shall also receive back pay relief as provided in paragraph 34a of this Decree. Mr. Thomas' remedial city seniority and adjusted classification seniority shall date from July 1, 1973. At the time Mr. Thomas fills a police officer vacancy with the City under this Decree, he shall be paid at the highest pay step for that classification.

e. John W. Martin alleged in the complaint that he was rejected for the position of security guard with the City of Birmingham because of race, after he had been certified by the Personnel Board as qualified for that position. Mr. Martin was subsequently hired by the City of Birmingham in another position. Mr. Martin shall receive back pay relief as provided in paragraph 34a of this Decree, but waives any claim to any other individual relief.

f. Charles Howard alleged in the complaint that he was denied a position as a firefighter with the City of Birmingham because of the racially discriminatory firefighter test. Mr. Howard shall receive back pay relief as provided in paragraph 34a of this Decree, but waives any claim to any other relief.

g. Wanda Thomas claims she was discriminated against by Jefferson County, not by the City of Birmingham. She therefore does not seek any relief against the City of Birmingham.

Each of the individual named plaintiffs, with the exception of Wanda Thomas, agrees to sign the release contained in Appendix E of this Decree. The plaintiffs do not waive any claims they may have for monetary relief or any other relief to which they may be entitled against any other defendants in these or any other actions.

B. Back Pay and Other Individual Relief In The Actions Brought By the United States and Private Plaintiffs

34. The City agrees to pay the sum of $265,000 in full and complete settlement of the claims against the City of Birmingham for monetary relief in these consolidated actions.

Any back pay awards to be made from such sum shall be subject to income tax withholding and the employee's share of social security. Within sixty-five (65) days after provisional approval of the Consent Decree by the District Court, or final approval of the Decree by the Court, whichever occurs first, the City agrees to pay the sum of $265,000 in full and complete settlement of the claims against the City of Birmingham for monetary relief in these consolidated actions. This sum shall be deposited in separate trust accounts bearing interest at the commercial rates as follows:

a. A fund in the total amount of $30,000 shall be set aside for the individual private plaintiffs referred to in paragraph 33. Within ten (10) days after the date this Decree is given final approval by the Court, the Clerk shall pay the following amounts to the following named plaintiffs, together with the interest accrued thereon.

Major Florence	$8,500
Ida McGruder	$6,500
Sam Coar	$6,500
Eugene Thomas	$4,000
John Martin	$3,500
Charles Howard	$1,000

These amounts shall be in full satisfaction of all claims of the named plaintiffs for monetary relief against the City of Birmingham in these consolidated actions including claims they may have as members of any of the subclasses.

b. A fund in the total amount of $5,000.00 shall be set aside for the members of Subclass No. 1 in Appendix C (the Police and Fire test subclass). Members of this subclass shall also be eligible for back pay relief under the Personnel Board Decree.

c. A fund in the total amount of $65,000.00 shall be set aside for the members of Subclass No. 2 in Appendix C (the Unclassified Service subclass).

d. A fund in the total amount of $137,000.00 shall be set aside for the members of Subclass No. 3 in Appendix C (the Streets and Sanitation promotional subclass).

e. A fund in the total amount of $6,000.00 shall be set aside for the members of Subclass No. 4 (the Policewomen subclass).

f. A fund in the total amount of $22,000.00 shall be set aside for the members of Subclass No. 5 (the Rejected Applicant subclass).

The amounts described in paragraphs b through f above, together with the interest accrued thereon, shall be paid to members of the appropriate subclasses as described in Appendix D. Payments from these separate funds shall be pursuant to Court order.

35. The amount of back pay relief allocated for each subclass listed in Appendix C has been determined by a calculation of the relative economic injury suffered by each of the subclasses. The amount of individual back pay relief for subclass members will be determined as described in Appendix D after the individual subclass members submit proof of claim forms in accordance with the provisions of paragraph 36 below.

36. Within ten (10) days after the Court gives final approval to the Consent Decree, written notice will be given by the City by certified mail, return receipt requested, to each of the members of the subclasses identified in Appendix C. Notice to such individuals will be sent to their last known address. The form of the notice is attached as Appendix G. Proof of claim forms (attached as Appendices H through L) will be included with the individual notice to class members. Each subclass member shall have sixty (60) days from the date of mailing to respond to this notice and to file his or her proof of claim form with the Clerk of the Court.

37. Within forty-five (45) days after receipt of all timely proof of claim forms, counsel for the plaintiffs will submit to the Court and counsel for the City a report listing each subclass

member who, in their view, is entitled to participate in the individual relief provisions of this Consent Decree. In preparing this report counsel for the plaintiffs shall be allowed access to the City's records and files after reasonable notice of no less than three (3) days, and any review of such records and files shall occur during normal working hours. Plaintiffs shall include a description of the job offer and remedial seniority, if any, to be offered by the City to the subclass member and the monetary relief, if any, to be afforded by the City to such person. In no event will the sum of the individual monetary awards to be paid by the City of Birmingham to the members of the subclasses identified in Appendix C, and to individual private plaintiffs identified in paragraph 33, exceed the sum of $265,000, plus any interest accrued thereon.

38. The City shall have ten (10) days from receipt of the plaintiffs' report on individual relief to notify, in writing, counsel for the plaintiffs of any objection(s) it may have to the job offer and/or seniority dates for the individuals identified in such report. If there is any such objection(s), the parties shall first attempt to reach a voluntary resolution of the matter(s). In the event the parties are unable to resolve such objection(s), they may petition the court for a resolution of such objection(s). The City agrees not to challenge any of the individual back pay awards to be made under this Consent Decree.

39. Remedial City seniority date, as that term is used in this Decree, shall mean the employee's seniority for purposes of promotion, vacation as accrued, sick leave, and longevity pay, but such date shall not be utilized for pension purposes. However, employees with remedial City seniority dates may elect, if state law permits, to pay into the City's pension system the amount of money the employee would have paid into the system had such employee been in active uninterrupted service with the City from such remedial date. Such election must be made and the required sum of money paid into the pension fund within six (6) months after the date the employee enters the City's service under the provisions of this decree or, in the case of current City employees, within six (6) months of their being notified that the Court has given final approval to their remedial

seniority rights under this Decree. Adjusted classification seniority, as that term is used in this Decree, shall mean the employee's seniority for layoff and recall in the jobs to be offered to individuals under Part XVI of this Decree.

40. Upon final determination of the awards of individual relief to be made under this Decree, the City of Birmingham shall within five (5) days thereafter notify by certified mail each of the subclass members who filed a timely request to be considered for individual relief of their proposed awards of relief, if any, as set forth in the plaintiffs' report submitted to the Court. This notice shall also inform each of these individuals of their right to object to the relief, if any, as contained in the report, and that they must file their objections in writing with the Clerk of the Court within fifteen (15) days of their receipt of this notice.

41. If any such objections are filed, the Court shall thereafter, and as soon as practicable, schedule a hearing at which it will rule upon any objections to the report which have been timely filed. At the conclusion of such hearing the Court shall determine whether to give final approval or disapproval to the awards of individual relief.

C. Implementation of Individual Relief

42. Immediately upon final approval by the Court of the awards of individual relief for subclass members to be made under this Decree, the City will begin to implement part XVI of this Decree as described herein. However, the City shall implement the relief for the named private plaintiffs as provided in paragraphs 33(a) through 33(f) of this Decree.

43. Any person entitled to individual relief (including the named private plaintiffs), in order to obtain such relief, must sign a notarized release which will be provided that person by the City (Appendix E) and return such notarized release to the City within thirty (30) days of that person's receipt thereof. Any such individual who either does not sign such notarized release or, alternatively, and absent good cause, does not return such signed notarized release to the City within thirty (30) days of that person's receipt thereof shall be deemed to have waived his

or her entitlement to such relief. Such release shall provide that the relief to which that person is entitled under part XVI of this Decree, if accepted, shall be in full and final settlement of any and all claims against the City of Birmingham based upon allegations of race or sex discrimination occurring prior to the date such release is signed. Such release shall be in the form exemplified by Appendix E attached hereto, or such other form upon which the plaintiffs and the City may agree and the Court approve.

44. The City of Birmingham shall send a notice to each of the subclass members entitled to individual relief informing them that the Court has given final approval to their right to such relief under this Decree. This notification shall be in writing, be made by certified mail, return receipt requested, and shall be approved as to substance and form by the plaintiffs prior to mailing. Included with such notice will be a copy of this Decree and the release form as described in paragraph 43 above. With respect to those individuals who are eligible for consideration to fill a future vacancy in a classified service position, the notice shall clearly and specifically inform such persons of the qualification requirements they will have to meet in order to be appointed to that position. Such notification also shall state that if the recipient has any questions above the notice, he or she may contact the Affirmative Action Officer, the Director of Personnel for the City or counsel for the plaintiffs whose names, addresses and phone numbers shall be listed in the notice, or their own counsel.

45. As the City receives releases from the named private plaintiffs and subclass members entitled to a back pay award under this Decree, it shall apply to the Court for Orders directing the Clerk of the Court to issue checks to such persons in the amount of his or her back pay award.

46. Subject to the provisions of paragraph 47a, each of the persons who are determined to be entitled to an offer of employment with the City pursuant to the plaintiffs' report as set forth in paragraph 37, shall be entitled to priority

appointments to future vacancies in such positions in the order provided in plaintiffs' report.

47a. The individuals named in Appendix C as members of subclass 3 are blacks who the parties have already determined are entitled to priority promotional opportunities in the Streets and Sanitation Department. Immediately upon final approval of this Consent Decree by the Court, those individuals shall be deemed by the City to be qualified for promotion to the jobs listed next to their names in the Appendix. The City agrees to promote these individuals to the first permanent full time vacancies which occur in the job listed next to their names after the Court grants final approval to this Decree. Where two or more persons named in this subclass are entitled to fill a future vacancy in the same position, priority of appointments shall be determined by the date of hire seniority dates listed next to their names in that Appendix.

47b. Except for the individuals who are named as members of subclass 3 in Appendix C who are eligible for priority promotional opportunity in the Streets and Sanitation department, each individual entitled to a job offer under this Decree and pursuant to the plaintiffs' report shall be required satisfactorily to demonstrate his or her qualifications for the job to be offered in accordance with the current qualification requirements for the job as established by the City and the defendant Jefferson County Personnel Board, provided that such requirements are administered in a nondiscriminatory manner, do not unlawfully discriminate either in purpose or effect against blacks or women, and do not otherwise conflict with the provisions of paragraph 1 of this Decree. The City agrees to waive any age requirements which may currently bar any such individual from obtaining employment with the City if such individual met such age requirements at the time of application. No such class member shall be required to pass any test or meet any other qualification standard which has been shown to have adverse impact on blacks or women.

XVIII [SIC]. NOTICE AND FAIRNESS HEARING

48a. Within ten (10) days after provisional approval of this Consent Decree by the Court, notice, in the form attached as Appendix F-1, will be issued by publication in the Sunday edition of the Birmingham News for two consecutive weeks, and in the Birmingham Times on one weekday directed to all interested persons informing them of the general provisions of this Decree and of their right to review a copy of the Decree which will be on file with the Clerk of the Court. Within this same ten (10) day period, individual notice will also be given of the general provisions of this Decree by the City to the subclasses identified in Appendix C. The cost of mailing and publication of any notices to be made under this Decree shall be paid by the City. The form of this notice is attached as Appendix F-2. Both notices by publication and the individual notices shall inform persons to whom such notices are directed of their right to be heard and to file objections, if any, to this Decree. Such objections must be filed with the Clerk of the Court by a date to be set by the Court in its Order granting provisional approval to this Decree. The Court shall thereafter, and on a date(s) to be fixed by the Court in its Order granting provisional approval to the Decree, schedule a fairness hearing at which those persons who file timely objections to the Decree will be heard. At the close of such hearing, or as soon as practicable thereafter, the Court shall rule upon such objections and grant final approval or disapproval to this Consent Decree. The Court shall, however, withhold final approval of the awards of individual relief to be made under this Decree, except the relief to be granted the individual named plaintiffs in the *Martin* case and the offers of promotion to be made to individuals named in Appendix C, until those class members who file a timely response to the notice of right to present a claim for relief under paragraph 36 above, are notified of their individual awards, if any, and are afforded an opportunity to be heard and to file any objections they may have to those awards.

48b. In the event there are objections to the Consent Decree which the Court overrules, the Court shall not implement the

Decree until thirty days after the entry of an Order finally approving the Decree.

XVIII. RECORDKEEPING

49. The City shall retain during the period of this Decree necessary records concerning the implementation of this Decree. These records shall be made available to the plaintiffs for inspection and copying upon written request.

50. The City's records shall include the following:

(a) A list of all organizations and schools which are contacted for recruitment purposes, showing the date that any notice of job opportunity was mailed to them, the position and number of positions to be filled from that notice, and the date through which applications could be received for the job which was advertised, including a summary or compilation of all other recruitment efforts aimed at minorities and women, together with the date of said efforts and the names and positions of the City's employees who made the contact and the nature of the contact.

(b) All written applications and related records for all persons seeking employment with the City, including applications for transfer or promotion within or among departments, for a period of at least five (5) years, and shall include on such applications identification of the applicant by race and sex. Such records shall also contain a statement of the reasons why any applicant was found not to be qualified for the position(s) applied for.

(c) With respect to any applicant who is certified for hire or promotion and who is not selected for the vacancy for which that applicant is certified, the City shall record in writing the reason(s) for the applicant's not being selected for that vacancy. Also, the City shall record and maintain any other written records or comments on an applicant for certification in accordance with paragraph 31(e) above.

(d) All written communications between the City and applicants for employment, transfer and promotion.

(e) All written communications between the City and employees concerning discipline and discharge, as well as all written reports concerning these matters.

XIX. REPORTING

51. Within ten days after adoption of the City's annual affirmative action plans and reports for each department, the City shall furnish a copy of every plan and report to the plaintiffs.

52. Within 60 days of the entry of this decree and thereafter semi-annually, the City shall report to the plaintiffs, the following information:

(a) A summary showing the total number of employees by race and sex in each job classification for each department of the City in both the classified and unclassified service.

(b) A list of all probational appointments for permanent full-time positions, by job classification and department, during the reporting period indicating the race and sex of the persons hired or promoted.

53. Within 60 days of the entry of this Decree and thereafter on an annual basis, the City shall report to the plaintiffs the following information:

(a) A list of all persons, by job classification, department, race and sex, to whom positions have been offered and whether or not the positions were accepted.

(b) A list of all promotions to permanent full-time positions in the classified service, by job classification and department, during the reporting period indicating the race, sex, date of initial hire in the classified service and date of the promotion.

(c) A breakdown of the applicant flow for employment with the City which indicates by race and sex the number of applicants for each department and job classification in the classified and unclassified service, and the number of applicants hired, rejected and pending for each job

classification and department. Applicant hires shall be separately identified as to Comprehensive Employment Training Act (CETA) positions.

(d) A summary report of the recruiting activities conducted by the City and the results of those activities.

(e) A report of the City's implementation of the individual relief provisions of this Decree. This report shall include a statement of the monetary payments, if any, that have been made to individuals entitled to such relief. This report shall further identify each individual who has been offered a job with remedial seniority under this Decree, and whether the job offer was accepted or rejected. For any individual who was disqualified from an offer of employment under Part XVI of this decree, a specific statement of the reasons for disqualification shall be included in this report.

(f) A list of the sworn personnel terminated from either the Police Department or the Fire Department, identifying each individual by race, sex, date of hire, date of termination, probational or permanent status, and rank. In addition, the report shall explain the reason each individual was terminated.

(g) Within thirty (30) days of establishment or revision, a copy of the written policy concerning background investigations required by paragraph 27.

XX. EFFECT OF COMPLIANCE

54. Compliance with the terms and conditions of this Consent Decree shall constitute compliance by the City with all obligations arising under Title VII of the Civil Rights Act of 1964, as amended, the State and Local Fiscal Assistance Act of 1972, as amended, the Omnibus Crime Control and Safe Streets Act of 1968, as amended, the Civil Rights Acts of 1866 and 1871, 42 U.S.C. §1981 and §1983, and the Fourteenth Amendment to the Constitution of the United States as raised by the plaintiffs' complaints. Insofar as any of the provisions of this Consent Decree or any actions taken pursuant to such provisions

may be inconsistent with any state or local civil service statute, law or regulation, the provisions of this Consent Decree shall prevail in accordance with the constitutional supremacy of federal substantive and remedial law.

XXI. RETENTION OF JURISDICTION

55. The Court retains jurisdiction of this action for such further relief or other orders as may be appropriate. At any time after six (6) years subsequent to the date of the entry of the Consent Decree, any party may move the Court upon forty-five (45) days notice to the other, to dissolve this Consent Decree. In considering whether the Consent Decree shall be dissolved, the Court will take into account whether the purposes of this Consent Decree have substantially been achieved.

Entered and Ordered this____ day of____, 1981.

_____
UNITED STATES DISTRICT JUDGE

AGREED AND CONSENTED TO:

For Plaintiff United States	DATED:
/s/ Richard J. Ritter	May 19, 1981
For the Plaintiffs in *Martin, et al. v. City of Birmingham, et al.*	
/s/ Susan W. Reeves/Stephen L. Spitz	May 19, 1981
For the Plaintiffs in *Ensley Branch of the N.A.A.C.P., et al. v. Seibels, et al.*	
/s/ Oscar W. Adams, III	May 19, 1981
For the Defendant City of Birmingham	
/s/ James K. Baker	May 19, 1981

Appendix A

Group I - Engineering Department

1. Professionals:
   (1) Graduate Engineer
   (2) Sr. Graduate Engineer
   (3) Airplane Fac. Engineer
   (4) Sr. Civil Engineer
   (5) Chief Civil Engineering
   (6) Chief Design Engineering

2. Technicians:
   (1) Civil Engineer
   (2) Engineering Technician
   (3) Sr. Engineering Technician
   (4) Chief of Party
   (5) Engineering Inspector
   (6) Sr. Engineering Inspector
   (7) Construction Cost Analyst
   (8) Media Spec.
   (9) Engineering Drafter
   (10 Sr. Engineering Drafter
   (11) Sr. Row Agent

Group II - Finance Department

1. Professionals:
   (1) Sr. Auditor
   (2) Sr. Accountant
   (3) Principal Accountant
   (4) Chief Accountant
   (5) Accountant
   (6) Auditor
   (7) Revenue Examiner

Group III - Inspection Services Department

1. Technicians: (other than Building Inspectors)
   (1) Maintenance Mechanic
   (2) Electrical Inspector
   (3) Chief Electrical Inspector
   (4) Elevator Inspector
   (5) Chief Elevator Inspector
   (6) Plumbing Inspector

Appendix A Cont'd.

(7) Gas Inspector
(8) Chief PI/Gas Inspector
(9) Chief Building Inspector
(10) Zoning Inspector
(11) Weights & Measures Inspector
(12) Sr. Weights & Measures Inspector

2. Skilled Craft Worker:
(1) Maintenance Mechanic
(2) WWTF Maintenance Worker
(3) Cabinet Maker
(4) Plumber
(5) Refrigerator & Heating Mechanic
(6) Painter
(7) Painter Supervisor
(8) Electrician

Group IV - Traffic Engineering Department

1. Technicians:
(1) Traffic Planning Technician
(2) Sr. Traffic Planning Technician
(3) Traffic Analyst
(4) Traffic Construction Supervisor
(5) Supv. of Traffic Construction Supervisor
(6) Traffic Operators Supervisor
(7) Street Light Inspector

Group V - Office of Housing

1. Professionals:
(1) Housing Rehabilitation Specialist
(2) Sr. Housing Rehab.
(3) Pr. Housing Rehab.
(4) Housing Relocation Officer

Appendix B

Group I - Police Department

1. Protective Service:
   (1) Police Officer

Group II - Police Department

1. Protective Service:
   (1) Police Sergeant

Group III - Fire Department

1. Protective Service:
   (1) Firefighter
   (2) Fire Prevention Inspector
   (3) Fire Communications Operator

Group IV - Engineering Department

1. Professionals:
   (1) Graduate Engineer
   (2) Sr. Graduate Engineer
   (3) Airplane Fac. Engineer
   (4) Sr. Civil Engineer
   (5) Chief Civil Engineering
   (6) Chief Design Engineering

2. Technicians:
   (1) Civil Engineer
   (2) Engineering Technician
   (3) Sr. Engineering Technician
   (4) Chief of Party
   (5) Engineering Inspector
   (6) Sr. Engineering Inspector
   (7) Construction Cost Analyst
   (8) Media Spec.
   (9) Engineering Drafter
   (10) Sr. Engineering Drafter
   (11) Sr. Row Agent

3. Para-Professionals
   (1) Engineering
   (2) Sr. Engineering Aide

Appendix B Cont'd.

Group V - Inspection Services Department

1. Professionals:
   (1) Architect
   (2) Architect Drafter
   (3) Plans Examiner
   (4) Zoning Coordinator

2. Technicians:
   (1) Communications Technician
   (2) Electrical Inspector
   (3) Chief Electrical Inspector
   (4) Elevator Inspector
   (5) Chief Elevator Inspector
   (6) Plumbing Inspector
   (7) Gas Inspector
   (8) Chief Pl/Gas Inspector
   (9) Building Inspector
   (10) Chief Building Inspector
   (11) Zoning Inspector
   (12) Weights & Measures Inspector
   (13) Sr. Weights & Measures Inspector

3. Skilled Craft Worker:
   (1) Maintenance Mechanic
   (2) Auto Mechanic
   (3) WWTF Maintenance Worker
   (4) Cabinet Maker
   (5) Plumber
   (6) Plumber
   (7) Painter
   (8) Painter Supervisor
   (9) Electrician

Group VI - Municipal Garage

1. Skilled Craft Worker:
   (1) Auto Mechanic
   (2) Auto Shop Supervisor
   (3) Auto Repair Expert

Appendix B Cont'd.

2. Service Maintenance Worker:
   (1) Service Station Attendant
   (2) Equipment Service Worker
   (3) Sr. Equipment Service Worker
   (4) Auto Mechanic Helper
   (5) Building Service Worker
   (6) Laborer

Group VII - Office of Housing

1. Professionals:
   (1) Housing Rehabilitation Specialist
   (2) Sr. Housing Rehab.
   (3) Pr. Housing Rehab.
   (4) A/HCUS Rehab. Officer
   (5) Housing Relocation Officer

Group VIII - Streets & Sanitation

1. Technicians:
   (1) Sanitation Inspector
   (2) Sr. Sanitation Inspector
   (3) Street Paving Spec.

2. Service Maintenance Worker:
   (1) Driver Messenger
   (2) Dist. Sit. Attn.
   (3) Truck Driver
   (4) Semi-Skilled Laborer
   (5) Shop Helper
   (6) Guard
   (7) Building Service Worker
   (8) Laborer
   (9) Refuse Collector

Group IX - Traffic Engineering

1. Professionals:
   (1) Traffic Systems Engineer
   (2) Sr. Traffic Systems Engineer

Appendix B Cont'd.

2. Technicians:
   (1) Traffic Planning Technician
   (2) Sr. Traffic Planning Technician
   (3) Traffic Analyst
   (4) Traffic Control Supervisor
   (5) Supv. Traffic Control Supervisor
   (6) Traffic Opns. Supervisor
   (7) Street Light Inspector

3. Skilled Craft Worker:
   (1) Traffic Signals Markings Worker
   (2) Traffic Signals Markings Crew Leader
   (3) Laborer

4. Service/Maintenance Worker:
   (1) Traffic Signs, Signals & Markings Worker
   (2) Traffic Signs, Signals & Markings Crew Leader

Group X - Parks & Recreation

1. Skilled Craft Worker:
   (1) Maintenance Mechanic
   (2) Park Maintenance Supervisor
   (3) Park Maintenance Supt.
   (4) Mason
   (5) Carpenter
   (6) Plumber
   (7) Painter
   (8) Sign Painter
   (9) Painter Supervisor
   (10) Electrician

APPENDIX C

Subclass No. 1

All black persons who took the 10-C Policeman Test which resulted in the eligibility lists for police officers in the City of Birmingham which were in effect between April 25, 1975, and January 10, 1977, and the 20-B Firefighter Test which resulted in the eligibility lists for firefighters in effect between July 8, 1976, and January 10, 1977, who have not been hired for police officer or firefighter positions by the City of Birmingham or who subsequent to the entry of this Court's Order on January 10, 1977, were hired by the City of Birmingham but who may have been hired earlier but for their rank on such eligibility lists.

Subclass No. 2

All blacks who prior to the entry of this Decree were hired and assigned to laborer positions in the unclassified service of the City of Birmingham who, at any time after March 24, 1972, worked as laborers in the unclassified service and who prior to the entry of this Decree, were reclassified into the classified service. Listed below are named individuals who the parties to this Decree acknowledge are properly members of this subclass. Additional names may be added to this subclass pursuant to the provisions of paragraph 36 of this Decree:

Birmingham Streets and Sanitation Department

1. James Addie
2. Burnice Anthony
3. Willie Allen
4. Johnnie Bridges
5. Johnny Brown
6. Eugene Carlton
7. Elmo Carter
8. John Carter
9. Herman Copes
10. Otis Dickerson
11. John Foster
12. Rickey K. Graham
13. Roy Harris
14. Melvin Harris
15. Emmitt Hicks
16. Adam Horne
17. David Horton
18. James Hudson
19. Alex Huggins
20. Bruno Huggins, Jr.
21. Norman Jackson
22. Houston Kennedy
23. Curtis W. King
24. Avance Lomax

25. James Lowery
26. Robert Lowery
27. Carl E. Morris
28. Elbert Muse
29. Trennon Nickerson
30. Henry Paige
31. Earnest Perry
32. Sammie Robinson
33. Edgar Sanders
34. Anthony Scales
35. James Shuford
36. Gus Smith
37. Jessie Staten
38. Otis Taylor
39. Winston Thomas
40. Wilson Tucker
41. Morris Weatherly
42. Willie Wells
43. Richard Whitaker
44. I. C. Williams

Birmingham Traffic Engineering

45. Larry W. Belle
46. Darryl Cobb
47. Andrew Davis
48. John Rancher
49. Henry Ray
50. Antonia J. Slaughter
51. Lee Walker
52. John Webb
53. Larry Webb

Birmingham Municipal Garage

54. Andrew L. Goodin
55. Charlie James
56. Fred Powell
57. Bobby J. Thomas
58. Wilbert Williams

Birmingham Parks and Recreation

59. D. C. Banks
60. Calvin Davis
61. David S. Handley
62. Augusta L. Jones
63. Melvin Webb
64. Herman Z. Whitehead
65. Caldwell Wright

Birmingham Building Maintenance

66. Abe Riggins, Jr.

Birmingham Fire Administration

67. John H. Hutchings

Subclass No. 3

All blacks who were denied promotional opportunities in the Streets and Sanitation Department of the City of Birmingham at any time after March 24, 1972. Listed below are named individuals who the parties to this Decree acknowledge are properly members of this subclass. Additional names may be added to this subclass pursuant to the provisions of paragraph 36 of this Decree.

Name	Date of Hire	Job
1. Charles Jordan	03/10/76	Construction Equipment Operator
2. Trennon Nickerson	09/15/66	Construction Equipment Operator
3. Roosevelt Parker	06/01/72	Construction Equipment Operator
4. Mose Shine, Jr.	04/24/67	Construction Equipment Operator
5. Charles Boyd	12/03/63	Labor Supervisor
6. Herman Copes	04/21/60	Labor Supervisor
7. Avance Lomax	06/29/70	Labor Supervisor
8. Samuel Bandy	12/28/61	Public Works Supervisor
9. A. B. Campbell	04/03/71	Public Works Supervisor
10. Willie Cargill	04/02/66	Public Works Supervisor
11. Major Florence	12/26/68	Public Works Supervisor
12. Willie Gossum	03/22/72	Public Works Supervisor
13. Clyde Hill	05/12/61	Public Works Supervisor
14. Arthur Jones	12/23/71	Public Works Supervisor
15. Cleo Lewis	12/27/71	Public Works Supervisor
16. Alfred Menfield	04/05/74	Public Works Supervisor
17. Orman Skinner	11/17/69	Public Works Supervisor
18. James Parker, Jr.	10/18/60	Refuse Truck Driver
19. Charlie Simmons	07/02/73	Refuse Truck Driver

Subclass No. 4

All women who prior to May 27, 1975, were hired by the City of Birmingham as traffic citation officers or policewomen and who on and after March 24, 1972, were assigned to the

youth aid division of the City police department. Listed below are named individuals who the parties to this Decree acknowledge are properly members of this subclass. Additional names may be added to this subclass pursuant to the provisions of paragraph 36 of this Decree.

1. Betty Jensen
2. Annalee Saunders

Subclass No. 5

All black persons who were certified by the Personnel Board for positions with the City of Birmingham in the police department as police officers, key punch operators, or clerk typists, or in the finance department as clerk typists or intermediate clerks, but who were not hired for those positions by the City of Birmingham during the period from March 24, 1972, through January 7, 1974.

APPENDIX D

The allocation of back pay amounts among the members of each subclass listed in Appendix C who file timely proof of claim forms shall be determined according to the following guidelines:

a. **Subclass No. 1** - All subclass members will share equally in the back pay allocated to this subclass under the Decree. In addition, individual members of this subclass may be entitled to back pay under the Consent Decree with the Personnel Board. If members of this subclass also applied for a police officer, firefighter, or deputy sheriff position(s) with any other defendant jurisdiction(s) in these consolidated actions, such persons shall not be deemed to have waived any back pay or other rights which they may have against that jurisdiction(s). Back pay may be denied to members of this subclass who refused prior offers of employment with the City as police officers or firefighters.

b. **Subclass No. 2** - Members of this subclass shall receive back pay according to the following formula:

   1. A calculation will be made of the difference between the annual pay of each subclass member in the unclassified service at the time of his reclassification and the annual pay he received in a classified service position at the time of reclassification. Some adjustments may be made in individual cases if there is evidence that an unclassified worker should have been reclassified in a higher paying job than the one he received at the time of reclassification.

   2. This difference will be multiplied by the number of years (rounded off to the nearest year) the back pay period for the jobs involved. The purpose of any such reduction(s) is to preclude the possibility of a "windfall" or double recovery for such claimant.

Public Works Supervisor and Construction Supervisor

Category No. 1 This category consists of subclass members who have been employed in the Streets and Sanitation Department of the City of Birmingham on a continuous basis since at least January 1, 1974, in a permanent, fulltime position as a Refuse Truck Driver, Heavy Equipment Operator, or Truck Driver in either the classified or unclassified service; and who demonstrate that, at any time between January 1, 1975 and October 31, 1979, they expressed an interest to the City or the Personnel Board in being considered for a promotion to a Public Works Supervisor or Construction Supervisor position.

Category No. 2 This category consists of subclass members who have been employed in the Streets and Sanitation Department of the City of Birmingham on a continuous basis since at least January 1, 1974, in a permanent, fulltime position as a Refuse Truck Driver, Heavy Equipment Operator or Truck Driver in either the classified or unclassified service.

Category No. 3 This category consists of subclass members who were employed in the Streets and Sanitation Department of the City of Birmingham on or after March 24, 1972, and who after that date were employed in a permanent fulltime position with the City as a Refuse Truck Driver, Heavy Equipment Operator or Truck Driver in either the classified or unclassified service.

Category No. 4 This category consists of subclass members who were employed in the Streets and Sanitation Department of the City of Birmingham on or after March 24, 1972, and

who accumulated at least ten (10) continuous years of service in the Streets and Sanitation Department as a classified and/or unclassified employee.

Category No. 5 This category shall consist of the claims of any remaining subclass members for these jobs.

Construction Equipment Operator

Category No. 1 This category consists of subclass members who have been employed in the Streets and Sanitation Department of the City of Birmingham, and who demonstrate that at any time between March 24, 1972, and October 31, 1979, they performed the work of a Construction Equipment Operator while classified as a Truck Driver, Semi-skilled Laborer or Unclassified Laborer in the Streets and Sanitation Department of the City.

Category No. 2 This category consists of subclass members who have been employed in the Streets and Sanitation Department of the City of Birmingham on a continuous basis since at least January 1, 1974; who, on or after March 24, 1972, were employed in a permanent fulltime position as a Truck Driver or a Semi-skilled Laborer, and who demonstrate that at any time after March 24, 1972, they expressed an interest to the City or the Personnel Board in being considered for a promotion to a Construction Equipment Operator position.

Category No. 3 This category consists of subclass members who have been employed in the Streets and Sanitation Department of the City of Birmingham on a continuous basis since at least January 1, 1974, and who, on or after March 24, 1972, were employed in a permanent

fulltime position as a Truck Driver or Semi-skilled Laborer.

Category No. 4 This category consists of subclass members employed in the Streets and Sanitation Department of the City of Birmingham on or after March 24, 1972, who accumulated at least ten (10) years continuous years of service in the Streets and Sanitation Department as a classified and/or unclassified employee.

Category No. 5 This category consists of subclass members employed in the Streets and Sanitation Department of the City of Birmingham on or after March 24, 1972 who, after that date, were employed in a permanent fulltime position with the City as a Truck Driver or Semi-skilled Laborer in either the classified or unclassified service.

Category No. 6 This category consists of the claims of any remaining subclass members for this job.

Labor Supervisor

Category No. 1 This category consists of subclass members who have been employed in the Streets and Sanitation Department of the City of Birmingham on a continuous basis since at least January 1, 1974, and who demonstrate that between March 24, 1972, and December 1, 1978, they expressed an interest to the City or the Personnel Board in being promoted to a Labor Supervisor position, and who, at the time they expressed such interest, were employed as a Truck Driver or Semi-skilled Laborer in either the classified or unclassified service.

Category No. 2 This category consists of subclass members who have been employed in

the Streets and Sanitation Department of the City of Birmingham on a continuous basis since at least January 1, 1974, and who, between March 24, 1972 and December 1, 1978, were employed in a permanent full time position as a Truck Driver or Semi-skilled Laborer in either the classified or unclassified service.

Category No. 3 This category consists of subclass members who, on or after March 24, 1972, were employed in the Streets and Sanitation Department of the City of Birmingham, and who worked in a permanent full time position as a Truck Driver or Semi-skilled Laborer in either the classified or unclassified service.

Category No. 4 This category consists of the claims of any remaining subclass members for this job.

Heavy Equipment Operator

Category No. 1 This category consists of subclass members who have been continuously employed in the Streets and Sanitation Department of the City of Birmingham since at least January 1, 1974, and who, on or after March 24, 1972, expressed an interest to the City or the Personnel Board in being promoted to a position as a Heavy Equipment Operator, and who, at the time they expressed such an interest, were employed as a Semi-skilled Laborer in either the classified or unclassified service.

Category No. 2 This category consists of subclass members who at any time between March 24, 1972, and July 1, 1978, took the written promotional examination for Heavy Equipment Operator, and who, prior to

January 1, 1979, were not promoted to a permanent, full time vacancy in that job.

Category No. 3 This category consists of subclass members who have been continuously employed in the Streets and Sanitation Department of the City of Birmingham since at least January 1, 1974, and who, on or after March 24, 1972, were employed in a permanent full time position as a Semi-skilled Laborer in either the classified or unclassified service.

Category No. 4 This category consists of the claims of any remaining subclass members for this job.

Refuse Truck Driver

Category No. 1 This category consists of subclass members who have been continuously employed in the Streets and Sanitation Department of the City of Birmingham since January 1, 1974, and who, on or after March 24, 1972, can demonstrate that they expressed an interest to the City or the Personnel Board in being considered for a promotion to a Refuse Truck Driver position, and who at the time they expressed such an interest were employed as a Semi-skilled Laborer or as a Laborer in the unclassified service.

Category No. 2 This category consists of subclass members who have been continuously employed in the Streets and Sanitation Department of the City of Birmingham since January 1, 1974, and who, on or after March 24, 1972, were employed in a permanent full time position as a Semi-skilled Laborer or as a Laborer in the unclassified service.

Category No. 3 This category consists of subclass members who, on or after March 24,

1972, were employed by the City of Birmingham as a Semi-skilled Laborer or as a Laborer in the unclassified service, and who accumulated at least ten (10) years continuous service in the Streets and Sanitation Department as a classified and/or unclassified employee.

Category No. 4 This category consists of the claims of any remaining subclass members for this job.

d. **Subclass No. 4** - Back pay for members of this subclass shall be based upon the difference in earnings between traffic citation officers and/or police women and police sergeants. Members of this class who demonstrate that on or after March 24, 1972, they were assigned to the Youth Aid Division and performed the same or similar duties as male sergeants in that Division, shall receive a back pay award based upon the number of years worked in the Youth Aid Division on and after March 24, 1972.

e. **Subclass No. 5** - Individual back pay for the members of subclass No. 5 shall be computed as follows. The number of actual vacancies filled by black persons in the positions and departments identified in Appendix C during the period from March 24, 1972, through January 7, 1974, will be subtracted from the number of vacancies in those positions that would have been expected to be filled by black persons if the proportion of black hires approximated the proportion of blacks who were certified for those vacancies during that period. This calculation will determine the black hire differential for each position. Back pay will be distributed to class members on a pro rata basis according to the relative black hire differential among the positions identified in the subclass definition.

Those individuals who turned down an offer for the position to which they were certified, failed to appear for an interview for such position after receiving notice

of such interview, or whose pre-employment backgrounds clearly demonstrate that such persons were not minimally qualified for employment for such positions, shall be ineligible for back pay.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
Southern Division

FILED MAR. 20, 1991
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
ENTERED MAY 21, 1991

UNITED STATES OF AMERICA, Plaintiff; -vs.- JEFFERSON COUNTY, et al., Defendants.	)	Case No. CV 75-P-666-S
JOHN W. MARTIN, et al., Plaintiffs; -vs.- CITY OF BIRMINGHAM, et al., Defendants.	)	Case No. CV 74-Z-17-S
ENSLEY BRANCH, N.A.A.C.P., et al., Plaintiffs; -vs.- GEORGE SEIBELS, et al., Defendants.	)	Case No. CV 74-Z-12-S

ORDER

In accordance with the opinion filed herewith, it is hereby ORDERED that the "Consent Decree with the City of

Birmingham," entered in 1981, is hereby AMENDED as follows:

1. The goals set for blacks and women in paragraphs 6, 7, 9a, and Appendices A and B shall no longer apply once the goal for such persons set in paragraph 5 has been, or may hereafter, be achieved with respect to that job classification.

2. The percentage goals set for blacks and women in paragraphs 6, 7, 9a, and Appendices A and B shall no longer apply as to promotional-level positions once the goal for such persons set in paragraph 5 has been, or may hereafter, be achieved with respect to the job classifications from which such promotions are made.

3. The percentage goals set for blacks and women in paragraphs 6, 7, 9a, and Appendices A and B shall not apply if the testing and screen procedures utilized by the Personnel Board with respect to a job classification either have no adverse impact upon such persons or are demonstrated to be valid under applicable law.

4. In determining whether goals set in paragraph 5 have been achieved, and in determining prior to that time how the goals set in paragraphs 6, 7, 9a, and Appendices A and B shall be applied, "common" jobs existing in more than one department that are subject to the same examination or selection procedures by the Personnel Board shall be treated as if a single job in a single department.

5. The parties are directed to confer and in good faith seek to determine which jobs held in a department by few persons should be combined with other jobs in that or other departments for purposes of determining whether goals set in paragraph 5 have been achieved and in determining prior to that time how the goals set in paragraphs 6, 7, 9a, and Appendices A and B shall be applied.

6. In addition to its retained powers under paragraph 55, the court shall, after this decree has been in effect for fifteen years, determine the extent, if any, that any goals set in paragraphs 6, 7, 9a, and Appendices A and B should thereafter remain in

effect with respect to classifications for which the goals set in paragraph 5 have not then been achieved.

The pending motions to modify the Consent Decree with the Personnel Board are DENIED, as are, except to the extent covered in this order, the pending motions to modify the Consent Decree with the City of Birmingham.

This the 17th day of May, 1991.

S. C. POINTER
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
Southern Division

FILED MAR. 20, 1991
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
ENTERED MAY 21, 1991

UNITED STATES OF AMERICA, Plaintiff; -vs.- JEFFERSON COUNTY, et al., Defendants.	)	Case No. CV 75-P-666-S
JOHN W. MARTIN, et al., Plaintiffs; -vs.- CITY OF BIRMINGHAM, et al., Defendants.	)	Case No. CV 74-Z-17-S
ENSLEY BRANCH, N.A.A.C.P., et al., Plaintiffs; -vs.- GEORGE SEIBELS, et al., Defendants.	)	Case No. CV 74-Z-12-S

OPINION

Under submission are motions and requests[1] to modify consent decrees involving the City of Birmingham and the Jefferson County Personnel Board that were entered in 1981. Following several months of discovery, an evidentiary hearing relating to these motions was held on February 27, 1991, and subsequently the parties filed briefs outlining their various positions. The primary focus is upon the City's consent decree. As will be explained, the court concludes that in certain respects modifications should be ordered.

I. Background: General Principles.

These cases were brought as "pattern and practice" actions and class actions, alleging employment discrimination by governmental bodies in Jefferson County against blacks and females. The consent decrees were entered in 1981 after the cases had been in litigation for over six years and after two trials. For almost ten years the parties have been operating under the terms of the decrees.[2] It can hardly be denied that during this period the decrees have, in conjunction with a city administration whose executive and legislative leaders have reflected the majority-black voting population within the city, served to reduce, if not eliminate, discriminatory employment practices against blacks and females and, indeed, to enhance the

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[1] On May 3, 1990, the United States filed its motion to modify both decrees. On May 23, 1990, the Wilks intervenor class filed their motion to modify both decrees, and amended this motion on June 27, 1990, and again on January 29, 1991. Motions for modification were not filed by the Martin plaintiff class, by the City of Birmingham, by the Jefferson County Personnel Board, or by the Bryant intervenor class; however, in their briefs all of these parties indicated their support for at least some modifications.

[2] Consent decrees involving various other governmental employers in Jefferson County, have, by their own terms, expired.

opportunities of such persons for employment and promotion.[3] Nor can it be denied that, in so doing, the decrees have impaired some employment or promotional opportunities of whites and males—which has in turn resulted in the filing of new individual and class actions that charge "reverse discrimination." Moreover, even for the primary beneficiaries of the decree, there is a tension between goals established for blacks and those established for females that has led, for example, to claims by white women that black men have been unfairly favored in certain employment decisions.

All parties agree that some modifications have become appropriate. This is hardly surprising given the details of the decrees, which, disregarding appendices, resulted in a 30-page decree with respect to the city and a 28-page decree with respect to the Personnel Board. They disagree as to the nature and scope of the modifications to be made, and as to the standards that govern the court in its consideration of these changes. In *Hodge v. Dept. of H.U.D.*, 862 F.2d 859 (11th Cir. 1989), the Eleventh Circuit attempted to harmonize *United States v. United Shoe Machinery Corp.*, 391 U.S. 244 (1968), with *United States v. Swift & Co.*, 286 U.S. 106 (1932), and provided additional guidance to district courts when confronted with a request for modification of an injunction. In essence, the court held that, when an injunctive decree involves the supervision of changing conduct or conditions and is therefore provisional and tentative, typically where the matters addressed involve "institutional" reform, modification may be granted more freely than when the decree was intended to protect rights fully accrued and substantially impervious to change. *Hodge*, 862 F.2d at 862-864, citing *Newman v. Graddick,* 740 F.2d 1513 (11th Cir.

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[3] As of September 7, 1990, blacks constituted over 45% of Birmingham's 3,750 permanent full-time employees, and females over 23% of these employees. In the two departments that were at the core of the litigation, the percentage of black employees rose during the past 8 years from 20% to 41% in Police Department and from 10% to 26% in the Fire and Rescue Service Department. The percentage of blacks and females in jobs above entry-level positions has also increased significantly in many departments.

1984), and *Nelson v. Collins*, 659 F.2d 420 (4th Cir. 1981) (*en banc*).

The consent decrees at issue here clearly are of the sort described in *Hodge* as subject to the more flexible standard for modification, under which this court is directed to consider whether particular modifications would, under the particular facts and circumstances, further the underlying purpose of the decrees. The decrees attempted to provide not only a remedy for those plaintiffs and class members who had been adversely affected by arguably discriminatory employment decisions—those with "accrued rights"—but also protection against future discrimination against blacks and females—those without any "accrued rights." While special provisions relating to enhanced opportunities for blacks and females were included in view of their "under-representation" in the work force, the decrees stated a broader and more fundamental objective: *e.g.*, paragraph 1 of the Birmingham consent decree stated that the City was

> permanently enjoined and restrained from engaging in any act or practice which has the purpose or effect of unlawfully discriminating against any employee of, or any applicant or prospective applicant with, the City of Birmingham because of such individual's race, color, or sex. Specifically, the City shall not discriminate on the basis of race, color or sex in recruiting, hiring, promotion, upgrading, training, job assignments, discharge or other disciplinary measures, compensation, or other terms and conditions of employment.

Seeking to strike an appropriate balance between the relief appropriate for those with arguably accrued rights and the more general proscription quoted above, the City decree established, *inter alia*, certain long-term goals and certain annual interim goals relating to the employment of minorities in various departments and jobs. The long-term goals were made expressly subject to the availability of qualified minority applicants. The annual goals were not only subject to the availability of qualified minority applicants, but also dependent upon the

percentages of minority candidates in the work force and in the applicant pools. The long term and annual goals were subject to modification based on disparities in the percentages of persons possessing degrees, licenses, or certificates required for particular jobs. Both types of goals were, therefore, necessarily dependent upon future conditions.

The decree required development of affirmative action plans and semi-annual reviews, recognizing that implementation was not a ministerial or mechanical process but would involve consideration of changing conditions. Detailed reports reflecting changes in the work force were required on an annual and semi-annual basis. By paragraph 55 of the Birmingham decree, the court retained jurisdiction "for such further relief or other orders as may be appropriate," and it was provided that after six years any party could move for dissolution of the decree, with the court to take into account whether the "purposes of this Consent Decree have substantially been achieved." These terms reflect the necessarily provisional nature of the consent decrees, which, though directed towards governmental employment practices, constituted an effort to effect "institutional reform" no less than injunctions affecting the operation of institutions such as prisons.

As noted in *Hodge*, the court's authority to modify the decrees is not unbounded. It is called upon to exercise "judicious discretion." In this process, the court should be guided by the underlying purposes of the decrees, evaluated in the light of current conditions. Changes in the employment practices of the city over the past 10 years, as well as changes in the legal principles governing discrimination claims and difficulties experienced in implementation of the decrees, are of particular significance. In this connection, it is not inappropriate to consider the impact the decrees have had, and may continue to have, upon the interests of persons who were not parties to the consent decrees, who therefore are not "bound" by such decrees, but who may be adversely affected by employment decisions authorized or directed by such

decrees.[4] While aware that the Supreme Court has recently granted certiorari in two cases that could result in that Court's reassessment of the standards appropriate for modification of injunctions, this court concludes that it should not defer its ruling while those cases are being considered.

II. Goals.

Under the decree the City of Birmingham was required to adopt "as a long term goal, subject to the availability of qualified applicants, the employment of blacks and women in each job classification in each department of the City . . . in percentages which approximate their respective percentages in the civilian labor force of Jefferson County as defined by the 1970 Federal Census." These percentages were to be modified to reflect the racial and sexual composition of the civilian labor force as reflected by the 1980 census.[5] Based on census data for the entire county, these long term goals were established as 28% for blacks and 43% for women.

For about 100 of the more than 500 job classifications, the decree set annual interim goals for hiring and promotions as a specific means for reaching these long term goals. The decree directed the city to attempt annually to fill vacancies in certain

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[4] In taking note of the claims of "reverse discrimination" brought by whites and males, the court is not ruling upon the merits of those claims or upon the merits of the defenses raised by the defendants therein, which in part emphasize their obligations under the consent decrees. Such matters are to be resolved in the consolidated litigation currently pending before the court under the style of "In re Birmingham Reverse Discrimination Litigation."

[5] The City, Martin plaintiffs, and Bryant intervenors have requested that the long term goals, at least where not already achieved, should be modified by using 1990 census data, which apparently will reflect that the percentage of blacks in the county's civilian labor force has risen from 28% to 32%. Given the dubious validity of this figure as a measure of a discrimination-free work force for the wide range of job classifications, as will be discussed *infra*, the court rejects this request.

jobs with blacks at stated rates ranging from 25% to 50%[6] or, if higher, in proportion to the number of black applicants. The city was directed to attempt annually to fill vacancies in specified jobs with women at stated rates ranging from 15% to 30%[7] or, if higher, in proportion to the number of female applicants. The annual goal for blacks was expressly made "subject to the availability of qualified black candidates," and, by virtue of another part of the decree, the same condition was also made applicable with respect to the annual goal for females.[8]

The parties who contend that the long term goals should be retained argue that, being based on census data for the entire county, the long term goal for blacks—28%—is conservative, since blacks constituted 50% of the city's civilian labor force according to the 1980 census. However, it was not—and is not—inappropriate to use the county figures as more reflective of the pool of potential applicants for employment or promotion.[9] Those who oppose retention of the long term goals argue—correctly—that the use of a single measure (civilian labor force) does not provide an accurate estimate of the pool of persons potentially qualified for each of the hundreds of different jobs in city service. There can be little doubt that the civilian labor force data would not pass muster under current

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[6] Special provisions were included with respect to promotions of qualified black candidates to the positions of lieutenant and captain in the police department and captain in the fire department.

[7] The annual goal for females for positions in the police department above the rank of sergeant was twice the proportion of women in the job classifications from which promotional candidates had been traditionally selected.

[8] Paragraph 2 provided that nothing in the decree should be interpreted "as requiring the City . . . to hire, transfer, or promote a person who is not qualified."

[9] Use of the county figures was not inadvertent. Indeed, as a means to accelerate attaining of the long term goals, the decree authorized the city to give a preference to residents of the city.

legal standards as a valid measure of a discrimination-free job force for all city jobs,[10] and only with respect to job classification requiring a professional degree, license, or certificate did the decree expressly authorize use of a measure other than this general labor force figure.

For many jobs, particularly entry-level and near entry-level classifications, the long term goal for blacks has been met; and, to a lesser extent, this goal for women has also been met. The parties are in general agreement that, when this has occurred, the annual goals should no longer be deemed applicable with respect to such position. The decree implicitly calls for elimination of such annual goals once the long term goal has been achieved, and there would be no need for a modification of the decree merely to address this explicitly.

Certain job classifications (e.g., cashier, data entry operator, intermediate clerk, etc.) are common to more than one city department and only one exam is administered by the Personnel Board for vacancies in the several departments. Frequently only one or two persons may be employed in such a classification in a particular department. Under the decree, however, the long term and annual goals are applicable to each classification separately within each department. As to these common job classifications, the decree should be modified to provide that employment statistics should be accumulated across departmental lines in determining whether the long term goals have been achieved and, in turn, whether any annual goals should continue in effect.[11] Otherwise the goals may not merely

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[10] *See Wards Cove Packing Co. Inc. v. Atonio*, ___ U.S. ___, 109 S.Ct. 2115, 2121 (1989) ("proper comparison is between the racial composition of [the particular jobs] and the racial composition of the qualified population in the relevant labor market").

[11] Of course, the city will still be under an obligation not to discriminate in selecting persons for these positions. Fulfillment of the long term goal simply has the effect of eliminating any preferential treatment that might be accorded on the basis of race, color, or gender through continuation of the annual goals.

correct "under-representation" of blacks or women, but indeed cause "over-representation." It should be noted that aggregation of data across department lines may cause goals to remain in effect for such a position within a department even after it has achieved the 28% or 43% level for the classification within that department.

Special problems arise in applying these goals—whether "long term" or "annual"—to the top positions in a department or, indeed, to any job classification in a department which is held by only a very few persons. A major difficulty is how to apply such a goal when only one or two persons hold the classification. A less obvious problem arises from the fact that vacancies in such positions may arise only infrequently, and that decades might be required before a black or woman was promoted to each such position. The decree should be modified so that, in measuring attainment of goals, some job classifications—though not subject to a common examination—should be aggregated, either within a department or perhaps across departmental lines. Further, the decree should be modified to call for a judicial reassessment at a specified future date as to whether there then is a need for any goals to remain in effect, without having to wait until such time that the decree should in all respects be dissolved. The latter has particular significance with respect to the prescribed 43% long term goal for women, which is clearly an invalid measure of any "under-representation" of females having an interest in many of the city's jobs.

As previously discussed, the long term goals—28% for blacks and 43% for women—are inherently suspect to the extent they govern employment decisions with respect to the wide range of job classifications currently in place. With the modifications above described, the adverse consequences arising from use of this potentially inappropriate measure will be partly reduced.

Moreover, these long term goals, in and of themselves, have proved in practice to be largely hortatory. Their primary effect has been to set a expiration date for the annual goals that have

actually affected employment decisions for about 100 job classifications. These annual goals have been the feature of the decree that have most directly enhanced the employment opportunities for blacks and females and, in turn, most directly affected those same opportunities for whites and males.

As previously noted, the annual goals impose upon the city an obligation to attempt to fill 25-50% of the annual vacancies in these classifications with blacks and 15-30% of the vacancies with females, or, if higher, in proportion to the number of blacks or females within the applicant group. These alternative percentage goals with respect to promotional positions can be justified if, in the positions from which promotions are traditionally made, blacks or women are still "under-represented." Where, however, promotions are made from incumbents in lower-ranked classifications and the long term goals for employment of blacks or women in those classifications have been achieved, the decree should no longer set annual goals at a rate greater than the proportion of minority applicants for the promotion. The decree should be modified to eliminate the percentage goals in such circumstances. If, for example, the 28% long term goal for blacks in Intermediate Clerk positions had been achieved, and there were 4 black and 8 whites applying for eight vacancies in Senior Clerk positions as to which the long term goal had not been achieved, the city should not be under a duty to appoint all four blacks in order to meet the 50% annual goal now stated in the decree. Appointing three blacks—in proportion to their percentage in the applicant group—should satisfy any goal prescribed in the decree to correct the effects of under-representation possibly caused by prior discrimination.

To summarize, the court concludes that, with respect to the stated goals, the City's decree should be modified to (1) make explicit that, once having satisfied the long term goal with respect to a job, any annual goals no longer are in effect with respect to that job; (2) to provide that, for "common" job classifications, data for such classifications should be aggregated for purposes of determining when the long term goals have been satisfied and, until such time, of applying

annual goals; (3) to direct the parties to study job classifications which are held by few persons to ascertain which should be aggregated, within or across departments, for purposes of determining when the long term goals have been satisfied and, until such time, of applying annual goals; and (4) to provide that the annual percentage goals specified in paragraphs 6, 7, and 9a and in Appendices A and B cease to apply with respect to promotional positions after the long term goals have been satisfied with respect to the job classifications from which such promotions are made.[12] With these changes, and with the modification relating to review of the goals discussed *infra*, the goals may be properly retained in the decree notwithstanding the problems created by use of the civilian labor force figures from the census.

III. Recruitment.

The parties are in general agreement that recruitment efforts by the City and the Board should be strengthened in various ways, such as advertising job opportunities in daily newspapers and special-audience media, and providing information about such opportunities to various institutions and organizations having an interest in employment of minorities. They also agree that, to enhance the its efforts, the city should be notified by the Board of any application periods for city job classifications at least 30 days before the expiration of such periods.

The city and Board have indicated their willingness to undertake such increased recruitment efforts. As such activities are already permitted and indeed encouraged by the decrees, the decrees do not need to be modified to accommodate such efforts.

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[12] Nor should an annual percentage goal apply to a job for which testing or screening procedures developed by the Personnel Board do not have an adverse impact upon blacks or females or are shown to be valid under the standards prescribed in the *Uniform Guidelines on Employee Selection Procedures*, 43 Fed.Reg. 38250 (August 25, 1978). Measurements of adverse impact should be based not simply on a pass-fail basis, but on the provisions for ranking successful applicants under the "Rule of Three" provision that ordinarily governs certification of candidates for vacancies.

IV. Duration of Goals.

The City's decree should be modified to provide that in five years the court will consider whether there is a demonstrated need for the retention of any annual goals for job classifications for which the long term goals have not then be met. Cessation of such goals after fifteen years of implementation may be appropriate even if, considering other aspects of the decree, all purposes of the decree have not been "substantially achieved" and hence the decree should not be totally dissolved.

V. Testing Procedures.

Several of the parties have requested that the court explicitly require the Personnel Board to develop testing and screening procedures that either would not have adverse impact upon minorities or would meet the validation standards prescribed by law. The court certainly agrees that use of such testing procedures would be desirable, but concludes that specific requirements for development and review, particularly if accompanied by a judicially-imposed timetable, would be unrealistic, unworkable, and unwise. The court declines to order any modification of the Board's decree. It should, however, be noted that the Board has indicated its willingness to give advance notice of planned new test administrations, providing the parties at least 90 days prior to administration dates in which to object or make suggestions for improvement of the procedures proposed.

This the 17th day of May, 1991.

S. C. POINTER
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
Southern Division

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N.D. OF ALABAMA
ENTERED SEP 25 1991

UNITED STATES OF AMERICA, Plaintiff;	)	
-vs.-	)	Case No. CV 75-P-666-S
JEFFERSON COUNTY, et al., Defendants.	)	
JOHN W. MARTIN, et al., Plaintiffs;	)	Case No. CV 74-Z-17-S
-vs.-	)	
CITY OF BIRMINGHAM, et al., Defendants.	)	
ENSLEY BRANCH, N.A.A.C.P., et al., Plaintiffs;	)	Case No. CV 74-Z-12-S
-vs.-	)	
GEORGE SEIBELS, et al., Defendants.	)	

ORDER

In accordance with the opinion filed herewith, it is hereby ORDERED that the Order of May 21, 1991, amending the

"Consent Decree with the City of Birmingham" entered in 1981, is itself AMENDED as follows:

A. Paragraph 1 of the Order of May 21, 1991, is amended to read as follows:

> "1. The goals set for blacks and women in paragraphs 6, 7, 9a, and Appendices A and B, and for blacks in paragraph 8 shall no longer apply once the goal for such persons set in paragraph 5 has been, or may hereafter be, achieved with respect to that job classification."

B. Paragraph 2 of the Order of May 21, 1991, is amended to read as follows:

> "2. The percentage goals set for blacks and women in paragraphs 6, 7, 9a, and Appendices A and B shall no longer apply as to promotional-level positions once the goal for such persons set in paragraph 5 has been, or may hereafter be, achieved with respect to the job classifications from which such promotions are made. Once the goals for blacks set in paragraph 5 have been achieved in the job classifications from which promotions are made to the positions of lieutenant and captain in the Police Department and captain and battalion chief in the Fire Department, the interim goals set forth in paragraph 8 shall not apply, and the interim goals shall be to promote, until the goals set in paragraph 5 are achieved, blacks to such positions in approximately the same proportion as the percentage of black applicants for such positions.

C. Paragraph 3 of the Order of May 21, 1991, is amended to read as follows:

> "3. The goals set for blacks and women in paragraphs 6, 7, 9a, and Appendices A and B and for blacks in paragraph 8 shall not apply if all testing and screening procedures utilized by the Personnel Board and by the City with respect to a job classification either have no adverse impact upon such persons or are demonstrated to be valid under applicable law."

D. Paragraph 10a of the 1981 "Consent Decree with the City of Birmingham" and Paragraph 23 of the 1981 "Consent Decree with the Jefferson County Personnel Board" are amended by adding to each the following:

> "Until such time that the testing and screening procedures utilized by the Personnel Board in certifying persons to the City of Birmingham with respect to a job classification either have no adverse impact upon black (or female) applicants or are demonstrated to be valid under applicable law, the Personnel Board shall, upon request by the City and subject to the availability of qualified applicants, include in the list of individuals certified to the City for consideration such number of black (or female) applicants as will approximately reflect the percentage of black (or female) applicants for the position."

E. Paragraph 6 of the Order of May 21, 1991, is amended to read as follows:

> "6. In addition to its retained powers under paragraph 55, the court shall, after this decree has been in effect for fifteen years, determine the extent, if any, that any goals set in paragraphs 6, 7, 8, 9a, and Appendices A and B should thereafter remain in effect with respect to classifications for which the goals set in paragraph 5 have not then been achieved and the extent, if any, that any special certifications of blacks or females should remain in effect."

Except as above provided, the pending motions to clarify, modify, amend, or reconsider the Order of May 21, 1991, are denied.

This the 25th day of September, 1991.

S.C. POINTER
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
Southern Division

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N.D. OF ALABAMA
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UNITED STATES OF AMERICA, Plaintiff; -vs.- JEFFERSON COUNTY, et al., Defendants.	)	Case No. CV 75-P-666-S
JOHN W. MARTIN, et al., Plaintiffs; -vs.- CITY OF BIRMINGHAM, et al., Defendants.	)	Case No. CV 74-Z-17-S
ENSLEY BRANCH, N.A.A.C.P., et al., Plaintiffs; -vs.- GEORGE SEIBELS, et al., Defendants.	)	Case No. CV 74-Z-12-S

OPINION

Under submission are motions by the parties to clarify, modify, amend, or reconsider the court's order dated May 21, 1991. Upon considering these motions and the parties' briefs

and after carefully scrutinizing the order for other possible problems, the court concludes that in a few respects the May 21st order should be amended.

The May 21st order inadvertently failed to address the interim goals for promotion of blacks to lieutenant and captain in the Police Department and to captain and battalion chief in the Fire Department. These goals, contained in paragraph 8 of the Consent Decree, should be treated like the goals for other positions established by paragraphs 6, 7, 9a, and Appendices A and B. To correct this emission, appropriate modifications are made to paragraphs 1, 2, 3, and 6 of the May 21st order.[1] Paragraph 5 of the May 21st order is not modified because, given the particular focus on these positions in the litigation and in the provisions of the Decree, these positions should not be combined with others in ascertaining when goals have been met.

Paragraph 3 of the May 21st order called for elimination of interim goals for positions at such time that the testing and screening procedures utilized by the Personnel Board for a position either have no adverse impact upon blacks or women or are demonstrated to be valid under applicable law. As stated above, these provisions should affect the goals set in paragraph 8 of the Consent Decree as well as the interim goals set in other portions of the Consent Decree. The language needs to be further revised to provide that, with respect to those few positions for which the City has imposed additional screening procedures, the interim goals should not be eliminated unless the additional screening procedures likewise either have no adverse impact or are valid under applicable law.

As written, paragraph 3 referred only to elimination of interim "percentage" goals. It would have inadvertently left in place the alternative interim goals of selecting applicants in proportion to "applicant flow" data even though the testing

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[1] Since, unlike the goals set for other positions, paragraph 8 of the Consent Decree did not contain an alternative "applicant flow" goal, the modification of paragraph 2 of the May 21st order requires more than merely inserting a cross reference to paragraph 8.

procedures had no adverse impact on blacks or women or were sufficiently job-related as to be valid under applicable law. To correct this error, the word "percentage" is eliminated from paragraph 3, so that both types of interim goals will be eliminated once satisfactory testing and screening procedures are utilized.

The last matter for consideration is one on which the parties are more sharply divided. It involves the question of what should happen after the long-term goals set in the Consent Decree have been met but while the Personnel Board continues to use tests that have adverse impact upon blacks or women but are not shown to be sufficiently job related to be valid under applicable law. The City correctly points out that, in such circumstances, it will be subject to potential liability under Title VII if it can appoint or promote only on the basis of certifications made from such discriminatory testing devices employed by the Personnel Board. *See, e.g., Powers v. Alabama Department of Education*, 854 F.2d 1285 (11th Cir. 1988).

The primary contention of the City and Martin plaintiffs is that the City should continue to have interim goals based on "applicant flow" data until validated or nondiscriminatory screening tests are developed by the Personnel Board. The more appropriate solution, however, is that, until such tests are developed, the City should simply be permitted to obtain enhanced certification lists based upon this "applicant flow" data. In making selections from these lists after the long-term goals have been reached, the City will be under no obligation, whether stated as an interim "goal" or otherwise, to give preference to applicants based on their race or sex, and indeed will be subject to the general proscription of the Consent Decree not to discriminate on the basis of such factors. By receiving certification lists that include blacks or women if part of the applicant group, the City will, in essence, be held accountable under Title VII only for its own actions, and not for the consequences of the Board's use of unvalidated discriminatory screening devices.

The May 21st order will, therefore, be modified to add provisions to the Consent Decrees with Birmingham and the Personnel Board enabling the City to obtain enhanced certification lists until the Board's tests either have no adverse impact or are shown to be valid under applicable law.

This the 25th day of September, 1991.

S. C. POINTER
United States District Judge

(2) (3)

Nos. 94-1397, 94-1422

Supreme Court, U.S.
FILED
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In The

Supreme Court of the United States

October Term, 1994

No. 94-1397

RICHARD ARRINGTON, JR., et al.,

v. *Petitioners,*

ROBERT K. WILKS, et al.,

Respondents,

and

No. 94-1422

JOHN W. MARTIN, et al.,

v. *Petitioners,*

ROBERT K. WILKS, et al.,

Respondents.

On Petitions For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

MEMORANDUM IN SUPPORT OF PETITIONS

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March 9, 1995

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QUESTIONS PRESENTED FOR REVIEW

This is a response to the Petitions for Writ of Certiorari submitted pursuant to Supreme Court Rule 12.4. Since Respondent supports the position of the Petitioners, it adopts the questions presented for review as stated by Petitioners.

PARTIES TO THE PROCEEDINGS BELOW

Plaintiffs

James A. Bennett
Birmingham Association of City Employees
Charles E. Carlin
Ronnie J. Chambers
Floyd E. Click
Joel A. Day
Lane L. Denard
John E. Garvich, Jr.
James W. Henson
Gerald L. Johnson
Danny R. Laughlin
Robert B. Millsap
James D. Morgan
Gene E. Northington
Carlice E. Payne
Howard E. Pope
Vincent J. Vella
Kenneth O. Ware
Phillip H. Whitley
Marshall G. Whitson
Robert K. Wilks
David H. Woodall

Plaintiff-Intervenor

United States of America

Defendants

Richard Arrington, Jr.
Roderick Beddow, Jr.
City of Birmingham
Joseph W. Curtin
James W. Curtin
Patricia Hoban-Moore
Jefferson County Personnel Board
James B. Johnson
Henry P. Johnston
Hiram Y. McKinney

Defendant-Intervenors

John W. Martin
Sam Coar
Major Florence
Charles Howard
Ida McGruder
Eugene Thomas

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Nos. 94-1397, 94-1422

In The

Supreme Court of the United States

October Term, 1994

No. 94-1397

RICHARD ARRINGTON, JR., et al.,

Petitioners,

v.

ROBERT K. WILKS, et al.,

Respondents,

and

No. 94-1422

JOHN W. MARTIN, et al.,

Petitioners,

v.

ROBERT K. WILKS, et al.,

Respondents.

On Petitions For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

MEMORANDUM IN SUPPORT OF PETITIONS

Respondent, Personnel Board of Jefferson County, Alabama, ("Personnel Board"), submits this memorandum in support of the Petitions for Writ of Certiorari filed

by Richard Arrington, Jr., City of Birmingham (City), John W. Martin, et al., (Petitioners) and pursuant to Supreme Court Rule 12.4 submit this Response to the Petitions. Supreme Court Rule 12.4 states in pertinent part:

> " . . . [A]ny respondent who supports the position of a petitioner shall meet the time schedule for filing papers which is provided for that petitioner, except that a response to the petition shall be filed within twenty days after its receipt . . . ".

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit at issue is reported as *In re Birmingham Reverse Discrimination Employment Litigation*, 20 F.3d 1525, *reh'g denied* (slip op.), *reh'g en banc denied*, ___ F.3d ___, 1994 WL 97742 (11th Cir. 1994). The opinion of the District Court is reported in *Bennett v. Arrington*, 806 F. Supp. 926 (N.D. Ala. 1992).

JURISDICTION

The judgment of the Court of Appeals was entered on May 4, 1994. The Court of Appeals denied Petitioners' and Personnel Board's Petitions for Rehearing on November 25, 1994. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 1254(1) and 2101(c).

STATUTES INVOLVED

The constitutional provisions, statutes, and regulations involved are: The Fourteenth Amendment to the Constitution of the United States and Section 703 of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2. U.S. Constitutional Amendment XIV, Section 1, the Equal Protection Clause, provides in pertinent part that "no state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

Title VII of the Civil Rights Act of 1964 provides, in pertinent part:

> (a) It shall be unlawful employment practice for an employer
>
> (1) to fail or refuse to hire . . . or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race . . . ; or
>
> (2) to . . . classify his employees . . . in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race. . . .

42 U.S.C. § 2000e-2.

STATEMENT OF THE CASE

The Personnel Board adopts by reference the Statement of the Case submitted by the Petitioners. In

response to the petitions, the Personnel Board would supplement the statements of the case as follows.

This matter arose from the August 14, 1992, judgment of the trial court rejecting claims made by a group of male, non-black employees of the City of Birmingham alleging that the City, acting pursuant to a consent decree it entered in 1981 to resolve pending litigation, violated their rights under Title VII and the Equal Protection Clause. The plaintiffs alleged that promotion decisions made under the decrees were based solely upon the race of the person selected.

In the mid 1970's, four separate cases that brought actions against the City of Birmingham, the Personnel Board, Jefferson County, and other local government agencies alleging that their hiring and promotion practices were discriminatory against blacks and women, were consolidated. While the cases were pending, the parties undertook settlement negotiations. In June 1981, the plaintiffs entered into separate consent decrees with the City and the Personnel Board. On June 8, 1981, the District Court entered an order provisionally approving the consent decrees, pending public notice and an opportunity for public comment at a fairness hearing held August 3, 1981.

On July 14, 1981, non-black City employees filed a motion for leave to intervene in the proceeding and at the fairness hearing objected to the proposed decrees. The motion to intervene was denied as untimely by the District Court and the decrees were approved on August 18, 1981. Subsequently, other non-black male employees filed several suits claiming that the implementation of the

decrees constituted reverse discrimination, alleging they were passed over for promotions as a result of their implementation.

A trial of the consolidated reverse cases was held December 16-20, 1985. In that trial, the District Court granted the Personnel Board's motion for dismissal upon a finding that the plaintiff "[did] not establish . . . unlawful discrimination by the Board." (R21-1257).

The District Court further clarified its ruling at a status conference held on November 21, 1989. The Court reiterated the status of the Personnel Board as a nominal defendant present for the limited purposes of facilitating discovery of documentary evidence and cooperating in the implementation of any prospective injunctive relief which might be afforded to the plaintiffs. (R9-12-13).

The 1991 District Court proceeding and subsequent August 14, 1992, judgment from which these petitions emanate (*Bennett v. Arrington*, 806 F.Supp. 926 (N.D. Ala. 1992)) was a supplemental trial to the 1985 trial and the evidence submitted at the 1985 trial was still before the Court. (R12-13).

Accordingly, the individual plaintiffs and plaintiff-intervenors and the Personnel Board entered into a joint stipulation acknowledging the ruling by the District Court and accepting that determination as final and binding. The plaintiffs further waived any and all rights to challenge or appeal the ruling of November 21, 1989. The plaintiffs further agreed not to seek any monetary relief, including costs or attorney's fees from the Personnel Board in this action. The Personnel Board also agreed not

to seek any costs, attorney's fees or other relief from the plaintiffs. (R1-100).

Additionally, during the November 21, 1989, status conference, the District Court confirmed that the issue of testing and examination validity had been severed from consideration in this phase of the litigation. (R9-14). The time-table for achieving goals and testing validation is an issue in the companion "consent decree cases" (*Ensley Branch N.A.A.C.P. v. Siebels*, 31 F.3d 1548 (11th Cir. 1994)) but is not at issue here.

REASONS FOR GRANTING THE WRIT

Respondent adopts the reasons for granting the writ as stated by the Petitioners. The Respondent would supplement the reasons for granting the writ as stated by the Petitioners as follows.

I. The Eleventh Circuit erroneously concluded that the Personnel Board certifies separate lists of black and non-black eligible candidates.

In discussing the operation of the City decree, the Eleventh Circuit found that the Personnel Board certifies names on separate lists of black and non-black eligible candidates.

> "If the City indicates on the request for certification that blacks are needed to meet the requirements of the decree, the Board reviews the eligible register and provides the necessary number of names on separate lists of black and non-black eligible candidates. Black candidates

> and non-black candidates are listed separately in the order in which they are ranked on the eligible register."

In re Birmingham Reverse Discrimination Empl. Litig., 20 F.3d 1525, 1535 (11th Cir. 1994). This is an erroneous conclusion and is not supported in the record. The Personnel Board does not and has not provided lists of eligible candidates classified by race or any other classification. If it is obligated to supplement a list under its consent decree it provides one supplemented list of eligible candidates.

The Personnel Board Enabling Act (1945 Ala. Acts No. 248, as amended), governs the appointment of applicants to vacancies in the classified service. It specifies that after receiving a request for certification from an appointing authority, "[t]he Director shall thereupon certify to the appointing authority the names of the three ranking eligibles . . . when the vacancy for which the appointing authority has requested *a list* of eligibles . . . ." The Enabling Act speaks of *a* list, in the singular, for each request for certification.

Likewise, the Personnel Board Rules and Regulations address certification of eligible employees for vacancies in the classified service. Rule 4.5 governs compilation of a list of eligibles upon request by an appointing authority. In pertinent part it reads as follows:

> **"4.5 CERTIFICATION**
>
> Based on the receipt of an authorized requisition from an appointing authority, the Director shall certify and/or refer the name of eligibles from

the appropriate lists[1] in the following priority and manner:

(a) First, the one (1) name of the ranking former employee of the department for each vacancy from the layoff list, if any, shall be appointed.

(b) Second, the three (3) ranking names of former employees of other departments for each vacancy from the layoff list, if any, shall be used.

(c) Third, the three (3) ranking names of the employees of a department for a vacancy, if and only if they are the ranking eligible on the promotional list from the department in which the requisition originated, shall be used.

(d) Fourth, for each vacancy the three (3) ranking names of employees from other departments on the promotional list, if any, shall be used.

(e) Fifth, for each vacancy the three (3) ranking names of eligibles from the open competitive list, if any, shall be used.

(f) In general all entry level positions to be filled from open competitive lists shall be filled by the rule of three (3), with one additional name for each vacancy past the first vacancy. In the event that *a* requested

---

[1] The plural "lists" here should not be confused with the list of candidates certified to an appointing authority upon request for certification. Here, "lists" refers to eligible registers from which the list of qualified candidates is certified to the appointing authority.

> *list* of eligible[s] is for a department head position, the Director shall certify to the appointing authority the names of six (6) eligibles unless the appointing authority shall request only the names of the three (3) ranking eligibles. If the requested *list* of eligible[s] is for the entry level position of police officer, deputy sheriff, or firefighter, then the appointing authority may elect to request the certification of the names of five (5) different eligibles for each vacancy. If the appointing authority elects to request the certification of the names of five (5) different eligibles, he shall notify the Board of such election in writing by the same methodology used to request the certification of eligibles for other vacancies as set out in these rules.
>
> (g) . . . " (emphasis added)

Thus, there is no provision in the Personnel Board Enabling Act or certification rule authorizing multiple certification lists.

Furthermore, the Personnel Board consent decree established no requirements for certification on separate lists of black and non-black eligible candidates. The decree sets annual goals of certifying black and female applicants to each of the jurisdictions served by the Board, subject to the availability of black and female applicants. (85-PX-5, Section IV). The decree also establishes as a means of ensuring that sufficient numbers of blacks and women are certified to meet the decrees' goals that "the Personnel Board may certify at least three eligibles for any job vacancy in the classified service and, where necessary to meet such goals, may expand further

the number of eligibles certified for a particular job vacancy." (85-PX-5, ¶ 34). The consent decree itself establishes no practice or procedure of providing separate lists of black and non-black eligible candidates for certifications for job vacancies. It allows for *supplementation* of eligible candidates to attempt to achieve the decrees' goals.

The erroneous assumption made by the Eleventh Circuit would prove unworkable for all practical purposes. The Personnel Board develops one list for each vacancy. The separate list scenario assumes that there are no black eligibles in the top three to be certified. Needless to say, there are often black eligibles certified without supplementation.

The Eleventh Circuit cited paragraphs 17 and 27 of *In re Birmingham Reverse Discrimination Employment Litig.*, 39 Fair Empl. Prac. Cas. (BNA) 1431 (N.D. Ala. 1985), *rev'd*, 833 F.2d 1492 (11th Cir. 1987), *aff'd sub nom. Martin v. Wilks*, 490 U.S. 755 (1989), as the source of the information concerning separate lists of black and non-black eligible candidates. Nothing in those paragraphs mentions or refers to "separate lists." In fact, paragraph 27 indicates that the City receives "*a* certification of the names of individuals eligible for a promotion." (emphasis added). Paragraph 27 further states: "[s]ince the entry of the City decree, when the City indicates on its request for certification that its promotional goals have not been met, the Board certifies ranking individuals pursuant to the rule of three, *plus* the names of a sufficient number of black individuals to enable the City to meet its City decree goals." *Id.* at 1437-38, 27 (emphasis added). There is no reference to separate lists but only to the *supplementation*

of a sufficient number of black individuals to enable the City to meet its goals.

The consent decree acknowledges that the decision to employ persons certified by the Personnel Board is left to the sole discretion of the appointing authority of each jurisdiction. (85-PX-5, ¶ 23). For this reason, the Personnel Board supplements its certification lists with sufficient names of black eligible candidates to enable the City to meet its goals under the decree.

CONCLUSION

For the reasons stated by the Petitioners and supplemented herein, this Respondent respectfully supports the Petitioners' requests to this Court to grant *certiorari* to review the decision of the Eleventh Circuit.

March 9, 1995

Respectfully submitted,

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Nos. 94-1397 & 94-1422

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

RICHARD ARRINGTON, JR., *et al.*,

Petitioners,

vs.

ROBERT K. WILKS, *et al.*,

Respondents.

JOHN W. MARTIN, *et al.*,

Petitioners,

vs.

ROBERT K. WILKS, *et al.*,

Respondents.

ON PETITIONS FOR WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

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Question Presented

Whether an affirmative action program embodied in a consent decree that, as implemented by a municipal employer, arbitrarily sets aside 50% of all promotional opportunities for blacks when blacks comprise some 10% of the qualified labor pool and fails to permit all qualified candidates to compete for all openings and have their relative qualifications considered unnecessarily trammels in violation of Title VII and is overbroad in violation of the Constitution.

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Nos. 94-1397 & 94-1422

IN THE

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OCTOBER TERM, 1994

RICHARD ARRINGTON, JR., *et al.*,

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JOHN W. MARTIN, *et al.*,

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ON PETITIONS FOR WRIT OF *CERTIORARI* TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

Plaintiffs-respondents Robert K. Wilks, et al. are fifteen individual white male employees of the City of Birmingham Fire & Rescue Service ("BFRS") and one white male employee of the City of Birmingham Engineering Department.[1] Each would have been promoted to a position as a Fire Lieutenant, Fire Captain or Civil Engineer but for the race conscious conduct of the City of Birmingham ("City"). The respondents filed individual suits against the City, Mayor Richard Arrington, Jr., and the Personnel Board of Jefferson County ("Board") under Title VII and the Equal Protection Clause. The defense to these suits was premised upon a claim of compliance with consent decrees entered in litigation to which respondents were not parties. The Eleventh Circuit Court of Appeals correctly held that the City's race-conscious actions violated Title VII and the Constitution.

Opinions Below

Respondents adopt the statement of opinions of the lower courts of petitioners Arrington and City of Birmingham. City Pet. 2.

Jurisdiction

Respondents adopt the statements of jurisdiction of the petitioners. City Pet. 2; Martin Pet. 2.

Statutes Involved

Respondents adopt the statement of Constitutional Provisions And Statutes Involved of petitioners Arrington and City of Birmingham. City Pet. 2; City App. 269a-270a.

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[1] In addition, an association of employees of the City is a plaintiff respondent.

Statement of the Case

A. Proceedings Leading to the Consent Decrees.

During 1974 and 1975, racial discrimination suits were filed by the United States, the Ensley Branch of of the NAACP, and a class of black persons led by petitioner-plaintiff John W. Martin. *United States v. Jefferson County, et al.*, CV-74-P-666-S and consolidated cases (N.D. Ala.). The complaints charged that the City of Birmingham ("City"), the Personnel Board of Jefferson County (the "Board"), Jefferson County and numerous other municipalities under the jurisdiction of the Board had engaged in employment practices resulting in unlawful discrimination against blacks and women in violation of Title VII of the Civil Rights Act of 1964, other federal statues and the Equal Protection Clause. The district court severed the issues for separate trials.

The 1976 trial addressed whether the Board's use of entry level Office Worker, Firefighter, and Police Officer examinations unlawfully discriminated against blacks. On January 10, 1977, the district court found that the Board's use of the Firefighter and Police Officer tests violated the Title VII rights of blacks. No violation of law was found in the use of the Office Worker test. Citing the good faith voluntary efforts of the Board to administer non-discriminatory tests and affirmatively recruit blacks for public employment, the district court rejected the claims of the United States and other plaintiffs under the Equal Protection Clause. The claim that the tests discriminated against women was dropped. As a remedial device, the district court ordered the Board to comply with a short term referral quota of blacks and thereafter achieve a goal of referral of blacks for entry level Firefighter and Police Officer positions based on applicant flow. No relief was ordered against the City. The district court's order, in relevant part, was upheld on appeal. *Ensley Branch of the NAACP v.*

Seibels, 616 F.2d 812 (5th Cir.), *cert. denied*, 449 U.S. 1061 (1980).

Following entry of the 1977 Order, many blacks were referred by the Board to the City and hired as firefighters. By the time of entry of the 1981 Decree, the City had hired 52 black firefighters. App. 248a.[2] After 1976, blacks were hired as firefighters at rates in excess of expectations based on availability in the labor pool. App. 46a, 255a.

A second trial was held in August and October 1979. At issue were eighteen additional tests and various other screening devices and rules used by the Board. BFRS promotional examinations were not among those challenged. 1985-DX-1428, 1429. As in the first trial, the City did not participate and any independent claims against the City were never tried.

Prior to the court's decision in the second trial, and following the election of Mayor Richard Arrington, Jr., counsel for the original parties (the City, Board, United States, and Martin plaintiffs) engaged in lengthy, secret negotiations which resulted in comprehensive consent decrees between the plaintiffs and the City and the Board. App. 109a (hereinafter "City Decree") and App. 203a (hereinafter "Personnel Board Decree").

In the process of the negotiation of the City Decree, the City continuously pressed for high fixed quotas with little monetary cost while the government urged goals based on twice the black representation in the applicable pool. App. 6a-9a. The City Council made no findings of past discrimination

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[2] Respondents will use the same format for citation of the trial court record and exhibits as used by the petitioners. See Martin Pet. at 2, n.1. References to the appendix to the City Petition, no. 94-1397, will be to App. XXa; the appendix to the Martin Petition, no. 94-1422, is referenced as AXX.

and paid little attention to the goal provisions of the Decree. Their primary concerns were cost and politics. 1991-PX-11 (pp. 217-234); 1991-PX-13; 1991-PX-14. Following approval of the Decree by the Birmingham City Council, the City's attorneys continued negotiations and then agreed to a 50% annual goal for the promotion of blacks to Fire Lieutenant jobs. App. 10a. The Decree had no termination date. App. 11a. The evidence was without dispute that racial politics played a significant role in the City's approval of the Decree.[3]

The two decrees were tendered to the district court and provisional approval was summarily entered on June 8, 1981. There was no actual notice of the pendency of the Decrees made to nonminority City employers sufficient to bind their interests. *Martin v. Wilks*, 490 U.S. 755 (1989). The Birmingham Fire Fighters Association appeared at a fairness hearing held on August 3, 1981 and objected to the proposed decrees. On August 4, 1981, it moved to intervene as of right under Rule 24, F.R.Civ.P.[4]

The district court entered an Order approving the two consent decrees on August 18, 1981. A106. The court's accompanying Opinion rejected all objections to the decrees and approved the settlement under a "reasonableness" standard.[5]

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[3] Councilman Clifford testified: "Whether it's stated or implied, [race] is always an issue." 1991-PX-14 (p. 36).

[4] The district court's statement that intervention was sought on August 19, 1981 is a mistake. City App. 72a.

[5] The approval of the Decrees was never reviewed by the Court of Appeals because the Eleventh Circuit dismissed the appeal from the denial of intervention. *United States v. Jefferson County*, 720 F.2d 1511 (11th Cir. 1983). The statement of the Martin petitioners that approval of the City Decree was affirmed by the Eleventh Circuit is wrong. Martin Pet. 2.

The "reasonableness" standard was sharply criticized as having "no support in the decisions of this Court" in *Wygant v. Jackson Bd. of Ed.*,

(Footnote continued)

A117. The district court found the motion to intervene untimely since "the litigation has been pending for over five years and has been vigorously contested by the existing parties through two trials and one appeal." A117.

B. The Consent Decrees.

The City Decree required the achievement of a long term goal of "the employment of blacks and women in each job classification in each department of the City of Birmingham in percentages which approximate their respective percentages in the civilian labor force of Jefferson County as defined by the [1980] Federal Census." Hence, the City's goal was to employ blacks in 28% of all positions in each separate job classification and women in 43% of all positions in each separate job classification. App. 90a. The Decree also required the City to achieve annual goals for appointment of blacks to some 100 of the 500 job classifications at rates from 25% to 50% or the percentage of black representation in the applicant group, whichever was higher. *Id.* For example, the City was thereby required to award 50% of Fire Lieutenant promotions and 50% of Police Sergeant promotions to blacks until achievement of the long term goal (28%) for blacks in each of those jobs. App. 90a, 91a, 114a-119a.

The Personnel Board Decree required the Board to utilize "selection standards or procedures which the Board can demonstrate either have no adverse impact or have been validated in accordance with the *Uniform Guidelines*." App. 207a. The Board Decree further authorized the Board to make efforts toward "revisions in scoring and ranking procedures which may be followed which will reduce or eliminate any adverse impact on blacks or women and which would continue to

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476 U.S. 267, 279 (1986) (plurality); *see also, Aikens v. City of Memphis*, 37 F.3d 1155 (6th Cir. 1994).

provide a sufficient pool of qualified candidates for certification and selection in accord with the goals of this Decree." App. 207a-208a. The Board Decree required that the Board ensure that blacks or women were certified for consideration for certain jobs at specified percentage rates and, in all respects, that the Board certify sufficient numbers of additional blacks and women as necessary to allow the City to meet the goals for appointment of blacks and women specified in the City Decree. App. 224a-225a.[6]

C. Post Consent Decree Proceedings.

On appeal by the Firefighters Association from the denial of its 1981 motion to intervene, the Eleventh Circuit found that the district court did not abuse its discretion by denying intervention to the nonminority employees in the consent decree proceedings. *United States v. Jefferson County*, 720 F.2d 1511 (11th Cir. 1983). The appeals court determined that the firefighters would suffer no prejudice by a denial of intervention since individual fire fighters were free to "institute an independent Title VII suit asserting the specific violations of their rights." Hence, the Eleventh Circuit did not then address the validity of the Decree.

Numerous independent Title VII/Equal Protection claims were filed by white male employees of the City of Birmingham.

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[6] Under the state law "Rule of Three", the Board certified the top three persons in the Register for a job opening. The City then appoints from the certified list of three. Under the Board Decree, it must also separately certify the highest ranking black or female on the Register -- no matter how far down the list. The record developed in 1985 demonstrated that the City and Board had to jump over some 80 qualified whites in order to certify and promote some black employees. During the period relevant to this case, the Personnel Board always certified two lists based on race for the jobs at issue. Those lists are in evidence. The Personnel Board's claim that the Eleventh Circuit's finding in this regard is wrong is blatantly false. Personnel Board Br. at 6,7.

Those complaints challenged actions taken by the City of Birmingham and the Personnel Board in race and gender-based employment practices which the City and Board contended were required or permitted by the consent decrees entered in this case. The various complaints were eventually consolidated before District Judge Pointer under the master caption file *In re: Birmingham Reverse Discrimination Employment Litigation*, CV 84-P-903-S, hereinafter "BRDEL". R2-1 (April 12, 1984).

In December 1985, Judge Pointer tried the claims of the first fifteen white male employees of the BFRS or Engineering Department that filed complaints in *BRDEL*. The district court had previously determined that the white male employees could not challenge actions required or permitted by the Decrees. R2-54, 55. The trial therefore focused on the City's conduct in implementing the City Decree and whether its actions were outside the limitations of City Decree paragraph 2.[7] The Court agreed that but for the race conscious decisions challenged here each plaintiff would have been promoted. A69. Finding that the plaintiffs had failed to demonstrate that the City and Board were acting in violation of the consent decrees, the court entered judgment for the defendants.[8] The

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[7] Paragraph 2 provides, in relevant part, that "nothing herein shall be interpreted as requiring the City to . . . promote a less qualified person, in preference to a person who is demonstrably better qualified based upon the results of a job related selection procedure." App. 112a.

[8] The initial opinion of the district court was delivered from the bench on December 20, 1985. A65-105; *BRDEL*, 39 FEP Cases (BNA) 1431 (N.D.Ala. 1985). Those findings were modified and supplemented following Rule 59 motions. See, R5-275, 276. Respondents challenged the findings that the challenged promotions were taken pursuant to the Decree in the first appeal, but the Court of Appeals never reached them because it reversed and ordered a new trial on the primary issue of preclusion. See, *BRDEL*, 833 F.2d 1492 (11th Cir. 1987), Brief of Appellants Wilks, et al., case no. 86-7108 (pp. 70-71) and Brief of the United States. The notion

(Footnote continued)

Eleventh Circuit reversed and this Court upheld the judgment of the Eleventh Circuit. *In re: Birmingham Reverse Discrimination Employment Litigation*, 833 F.2d 1492 (11th Cir. 1987), *aff'd sub nom., Martin v. Wilks*, 490 U.S. 755 (1989).

This Court found that it was incorrect to bind the white male plaintiffs, as nonparties, to the provisions of the decrees. Rather, plaintiffs remained free to challenge actions taken pursuant to the decrees as violative of their rights under Title VII or the Fourteenth Amendment. 490 U.S. 755, 769. The Eleventh Circuit also directed the district court on remand to apply heightened scrutiny to the City Decree:

> The City Decree does contain a provision -- paragraph 2 -- that facially serves to protect the interests of nonminority employees. In light of the district court's interpretation of paragraph 2, however, that protection is illusory at best. The district court's interpretation of the City Decree permits the City to make race conscious promotions without using any job-related selection procedure. Given the natural potential that such an arrangement will trammel the interests of nonminority employees, we are compelled to the conclusion that the district court should subject the consent decrees to heightened scrutiny under the second prong of the *Johnson* analysis when it tries the individual plaintiffs' claims.

BRDEL, 833 F.2d at 1501.

Following the 1989 decision of this Court, the district court articulated a view that prospective relief in *BRDEL* should be governed by modification proceedings in the original consent

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that *all* of the district court's 1985 findings are undisturbed or are law of the case is wrong. See Martin Pet. at 7, 9 n.8. Each of the district court's decisions has been reversed in relevant part.

decree case. The district court further noted that the law is now clear that it is advantageous to have all interested parties before the court in the consent decree proceedings and thereby invited the non-black male employees to participate in the consent decree litigation.

D. The Modification Proceedings.

On March 29, 1990, the plaintiffs in *BRDEL*, Robert K. Wilks, et al., filed a motion to intervene in the consent decree cases and consolidate the two matters for further proceedings. R1-54. The district court granted intervention but denied consolidation. R1-77. The United States and the Wilks plaintiff-intervenors then moved the court to modify the decrees.

On May 21, 1991, the district court entered an Order and Opinion which acknowledged that the goal provisions of the 1981 Decree would not pass muster under current caselaw and modified the goals to some extent. App. 84a, 102a. Dissatisfied with the limited extent of the court's modifications, the Wilks plaintiffs and United States appealed. The Eleventh Circuit reversed the district court's decision and provided detailed instructions for the district court to vacate the goals of the Decree and construct a new valid remedial plan, to the extent one is still necessary. *See, Ensley Branch v. Seibels*, 31 F.3d 1548 (11th Cir. 1994). No party sought review of that decision by this Court.

E. The 1991 Trial and Decision of the District Court.

On October 21, 1991, the district court held a supplemental trial on plaintiffs' reverse discrimination claims. The evidence submitted at the 1985 trial was still before the district court and there was no need to repeat the presentation of that evidence. R12-13. Additional oral and documentary evidence was submitted. Plaintiffs submitted extensive evidence demonstrating the process by which the affirmative action

plan as embodied in the 1981 City Decree was negotiated and constructed.

On August 4, 1992, the district court entered its Order and Final Judgment dismissing the claims of the fifteen employees whose claims were tried at the 1985 and 1991 trials. App. 69a. In its Opinion, App. 71a, the court found that the race-based relief incorporated into the 1981 Decrees was permissible under both Title VII and the Constitution. The district court held that the City had met its burden of proving that its adherence to the decree was a valid defense. First, the district court rejected plaintiffs' contention that the City must make findings of past discrimination in order to justify its adoption of a race-conscious plan and, rather, adopted the view that "the issue is whether at the time it agreed to the consent decree the City had a strong basis in evidence for believing that there had been discrimination against blacks (and women)." App. 76a, n.4. In support of the decrees, the district court cited: (1) its 1976 finding that the entry level tests for the Fire and Police Departments violated Title VII; (2) "the discriminatory restrictions on these entry level positions meant, of course, that blacks had been denied the opportunity to hold higher level positions in these departments;" and (3) that other evidence was submitted in 1979 "attacking scores of other tests and selection devices administered by the Personnel Board . . ." App. 77a-78a. On that basis the district court found that the first prong of the analyses required by *Johnson* (Title VII) and *Croson* (Equal Protection) had been satisfied. App. 76a.

The district court characterized *Croson's* second prong -- narrow tailoring -- as a "closer question." App. 78a. The court found that the City Decree satisfied considerations of flexibility and duration because it did not require the hiring of unqualified persons. The court described the Decree as "requiring" the reflexive promotion of blacks on a one-for-one basis:

> Instead, [the Decree] requires that, when both black and white firefighters are certified to the Fire Department as qualified applicants for a promotion, the Department will alternate between blacks and whites, selecting the white or black applicant who is ranked highest according to the Board's ranking procedure.

App. 79a-80a. The court also found the Decree sufficiently narrowly tailored because it seeks a long term goal of achievement of a work force mirroring the representation of blacks and women in the Jefferson County labor force based on 1980 federal census data.[9] The district court noted that the interim goals for promotion to Fire Captain and Fire Battalion Chief were appropriate because they "were tied to black representation within [the Fire] Department, albeit accelerated by the original interim goal to twice the representation of blacks in the Department. App. 82a. Surprisingly, the district court made no mention of the 50% annual goal for promotions to Fire Lieutenant and the basis on which it implicitly found the goal to be valid. *Id.* That goal has been the focal point of this litigation. Finally, the court found the burden on the plaintiffs was "acceptable" because there "were no provisions to use layoffs as a means for favoring junior black employees over more senior white employees, nor was there an absolute bar to promotions for white Department members, since half of the promotions would be whites." App. 83a. No mention was made of the justification for the Engineering Department goal.

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[9] The suggestion by the petitioners that they could have chosen the larger black population of the City of Birmingham proper as the relevant labor pool is a recent fabrication. City Pet. 7, n.3; Martin Pet. 13. The evidence submitted by the City's own expert did not use the City of Birmingham civilian labor force as the relevant labor pool. App. 252a-256a.

F. The Decision of the Eleventh Circuit.

On appeal by the Wilks plaintiffs, the Eleventh Circuit reversed with instructions to provide a remedy to the plaintiffs. App. 54a.

Employing the district court's 1985 findings of fact, the Court of Appeals confirmed that the City promotes from two separate lists of black and non-black candidates, never compares the relative qualifications of competing candidates for promotion and simply promoted in rank order with "alternate selections between the top name on the black list and the top name on the non-black list until the available openings are filled." App. 18a. Hence, the Eleventh Circuit noted, "employees who will eventually fill an opening in the BFRS are pre-selected by race." App. 19a. The appeals court found:

> Among employees certified by the Board as eligible candidates, promotions are awarded solely by race. No black employee ever competes for the two openings designated in advance to be filled by non-blacks. No non-black employee can compete for the two openings designated for blacks.

App. 20a.

Unlike the district court, the Eleventh Circuit separately evaluated the claims of the Wilks respondents under Title VII and the Equal Protection Clause. App. 15a, 20a. The appeals court evaluated the Title VII claim under the standard of *Johnson v. Transportation Agency*, 480 U.S. 616 (1987) and the constitutional claim under the standard of *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

The appeals court upheld the district court's finding that the "City had strong evidence before it to believe it had engaged in past racial discrimination when it entered the consent decree," App. 31a, 32a, and therefore satisfied the first prong of

the *Johnson* analysis. Considering the second prong of the *Johnson* test -- unnecessary trammeling of the interests of nonminorities -- the Eleventh Circuit found that the City's use of race as the "sole factor" in making promotions from "separate lists to fill openings allocated by race" was the very sort of racial quota plan cautioned against by this Court in *Johnson*. App. 33a. Finding the 50% annual promotional quota "arbitrarily-selected" and "unduly restricting the promotional opportunities" of non-black firefighters when blacks represented only 9% of the pool of possibly-qualified applicants for promotion to a job requiring special training and qualifications, the Eleventh Circuit found the City unnecessarily trammeled the rights of the respondents. App. 36a, 37a. The court determined that trammeling was clear due to the fact that -- unlike a case involving a valid hiring goal -- this case involves a promotional quota where a small group of nonminority promotional applicants had to shoulder the entire burden of a remedy that bore no reasonable relationship to the representation of blacks among firefighters qualified for promotion. App. 37a-39a.

The Eleventh Circuit also found the City in violation of the Equal Protection Clause of the Fourteenth Amendment under the standards of analysis provided in *Croson* and *Wygant v. Jackson Bd. of Education*, 476 U.S. 267 (1986). The appeals court found "the City had a compelling interest in providing a remedy for its prior discriminatory employment practices,[10]

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[10] Respondents continue to maintain, as they did in the lower courts, that the City lacked a sufficient compelling governmental interest grounded in either actual findings of past discrimination or an adequate record of past discrimination to justify a race-based remedy for *each* job classification in *each* department of the City's employment structure -- and particularly with respect to the Fire Lieutenant, Fire Captain and Civil Engineer jobs at issue in these challenges. The Eleventh Circuit erroneously equated the requirements of past discrimination with the manifest imbalance test of

(Footnote continued)

but that the City's use of race in its affirmative action plan was not narrowly tailored to achieve that interest as required under the Equal Protection Clause." App. 41a. The appeals court noted that the Decree was not intended to provide relief to identified victims of past discrimination, there was no sufficient consideration of race-neutral alternatives, and pre-decree efforts of the City to increase black representation in the BFRS with limited referral goals from the Board were "encouraging not ineffective" as found by the district court. App. 44a-46a. Moreover, the City made no effort to consider less onerous racial solutions, such as a plan like that approved in *Johnson*, than the strict quota eventually implemented by the City. App. 47a. Rather than providing a "proper remedy for past discrimination," the Eleventh Circuit found that the City's imposition of a "50% annual quota for promotions of blacks" was "designed to achieve the unconstitutional objective of outright racial balancing." App. 49a. Such a "rigid approach, while administratively convenient, is not a narrowly tailored means to remedy prior discrimination" and is ". . . instead an approach designed to achieve government-mandated racial balancing - the perpetuation of discrimination by government." App. 51a. The appeals court found the 50% goal for promotion to Fire Lieutenant bore no relationship to the relevant labor market of blacks within the ranks of trained firefighters. App. 51a, 52a. Finally, the court found the Decree's impact on the Wilks plaintiffs excessive due to the open duration of the decree and the elimination of half of all promotional opportunities for nonblacks on the sole basis of their race. App. 52a, 53a.

Title VII. App. 42a. Respondents contend that the City's plan does not pass muster under either prong of the *Croson* or *Johnson* analyses.

SUMMARY OF THE ARGUMENT

In a painstakingly thorough opinion, the Court of Appeals for the Eleventh Circuit found that the City of Birmingham engaged in race-conscious actions that clearly violate the permissible limits of lawful affirmative action under this Court's precedents. The petitions of the City of Birmingham and those representing the interests of black employees should be denied.

The Eleventh Circuit's finding that the City's inflexible one-for-one promotional quota program is unlawful is entirely consistent with *Croson, Paradise, Wygant, Johnson, Weber* and the decisions of other Courts of Appeals dealing with similar issues. Moreover, the Eleventh Circuit's decision strictly scrutinizing Birmingham's conduct is consistent with the current national agenda to take a hard look at affirmative action to ensure against abuses.

The City of Birmingham's complaint that it has been forced to endure a twenty year gauntlet of employment litigation, City Pet. 17-18, ignores the fact that Birmingham is in a dilemma of its own making. The City has steadfastly defended its right to engage in a strict program of quotas throughout this litigation and sought to blame everyone -- the Department of Justice, the Personnel Board, the white employees and the courts -- for its problems. The truth is that the City's quota program is consistent with the racial-political agenda of those in power in City government.

Respondents have endured a fourteen year battle to assert their right to fair and nondiscriminatory treatment by their employer. While the issue of valid affirmative action is an important one, respondents urge this Court to deny certiorari so they may now obtain their long-denied remedy.

ARGUMENT

I. The Eleventh Circuit's Decision Is Consistent With Current Precedent Governing Valid Affirmative Action.

A. *Croson* Provides The Standard For Constitutional Scrutiny of the City's Conduct.

Seeking to avoid the rules governing voluntary race-based affirmative action announced in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), the City contends that *Croson* is of little relevance in evaluating race-based action taken pursuant to a consent decree. Rather, petitioners rely on *Weber* (a Title VII case), the plurality opinion in *Paradise*, and *Sheet Metal Workers* (court-ordered remedy for an egregious continuing Title VII violation).[11] City Pet. 8, 9; Martin Pet. 10-13.

It is well-settled that this Court's decision in *Croson* represented a landmark decision settling the standard for evaluation of voluntary race-conscious efforts. Municipal remedial race-based conduct should be subjected to strict and searching scrutiny. *Croson*, 488 U.S. at 494. That standard and the *Croson* analysis apply to employment cases as well as cases involving programs to encourage minority participation in public contracts. 488 U.S. 501.[12]

The City petitioners seek recognition of different -- but undefined -- standard for voluntary race-based conduct taken pursuant to an employment consent decree. City Pet. 8. In

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[11] *United Steelworkers v. Weber*, 443 U.S. 193 (1979); *United States v. Paradise*, 480 U.S. 149 (1987) (plurality op.); and *Local 28, Sheet Metal Workers v. EEOC*, 478 U.S. 221 (1986) (plurality in relevant part).

[12] *Croson* has been uniformly applied to cases involving race-based voluntary action by a state actor. *See Podbesesky v. Kirwan*, 38 F.3d 147 (4th Cir. 1994) (receipt of state scholarship aid).

BRDEL, 833 F.2d 1492 (11th Cir. 1987), *affirmed*, 490 U.S. 755 (1989), now law of the case, the Eleventh Circuit confirmed that the City's conduct was voluntary race-based action to be evaluated under the standards applicable to a purely voluntary affirmative action plan. See also, *Local 93, Firefighters v. City of Cleveland*, 478 U.S. 501, 517 (1987) ("there does not seem to be any reason to distinguish between voluntary action taken in a consent decree and voluntary action taken entirely outside the context of litigation"). The law is settled that there is no basis for creating a different rule for affirmative action embodied in a consent decree. Nor do the defendants suggest any policy reasons for a different standard.

Every Court of Appeals that has evaluated race-based affirmative action by a public employer has recognized that the rules of *Croson* govern the issue of constitutional validity. *See, Stuart v. Roache*, 951 F.2d 446, 449-50 (1st Cir. 1991) (Breyer, Ch. J) (evaluating decree under *Croson* strict scrutiny standard); *Hayes v. North State Law Enforcement Officer Association*, 10 F.3d 207 (4th Cir. 1993); *Edwards v. City of Houston*, 37 F.3d 1097, 1112 (5th Cir. 1994); *United Black Firefighters Association v. City of Akron*, 976 F.2d 999, 1008 (6th Cir. 1992) ("Croson does not exempt consent decrees from its requirements."); *Billish v. City of Chicago*, 989 F.2d 890 (7th Cir. 1993) (en banc, Posner, J.), *cert. denied*, 114 S. Ct. 290; *Davis v. San Francisco*, 890 F.2d 1438 (9th Cir. 1989); *Cunico v. Pueblo School District*, 917 F.2d 431 (10th Cir. 1990); *Peightal v. Metro Dade County*, 940 F.2d 1394 (11th Cir. 1991). Nevertheless, the City of Birmingham contends *Croson* does not apply, while the Martin petitioners simply ignore *Croson's* existence. Their argument that *Croson* does not apply when evaluating race-based conduct of a public employer taken pursuant to a consent decree is meritless and not worthy of review by this Court.

B. The Eleventh Circuit's Decision Does Not Conflict With This Court's Precedents.

Respondents rely heavily upon the *Paradise* plurality opinion, *Sheet Metal Workers* and *Weber* in urging this Court to grant review. They effectively claim that the approval of race-based set asides in those cases mandate approval of all racial set asides. None of those cases involved voluntary action by a municipal employer. *Paradise* and *Sheet Metal Workers* involved judicially-crafted remedial plans imposed upon recalcitrant defendants. *Weber* involved an entry-level training program adopted by a private employer.

In *Paradise*, the plurality opinion relied upon by petitioners described a twelve year history of violation after violation of court orders and consent decrees by the Alabama Department of Public Safety in developing fair and nondiscriminatory selection procedures to remedy an egregious constitutional violation. 480 U.S. 167-73. Only after the State of Alabama failed to honor several deadlines it has previously agreed to for the development of fair tests, and faced with the State's claim of an urgent need to promote sixteen troopers to corporal, did the district court order the State to reserve 50% of the promotional positions for blacks *until such time as a nondiscriminatory selection procedure was in place*. 480 U.S. 178. The district court's order had the desired coercive effect of forcing the Department of Public Safety into prompt compliance with federal law when it promptly adopted fair selection procedures immediately after the first round of promotions thereby nullifying the racial remedy in short order. 480 U.S. 179. In *Paradise*, the district court's efforts to use less intrusive remedies were ineffective in the face of official obstruction by the State of Alabama.[13] Here, the case is the

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[13] The Eleventh Circuit recognized this factor is distinguishing *Paradise*:

(Footnote continued)

exact opposite. Birmingham desires to promote in a strictly racial fashion and has no interest in the development of race-neutral selection procedures.

Sheet Metal Workers, a Title VII case, involved a recalcitrant New York City construction union that for many years had repeatedly violated court orders to open its membership to blacks.[14] Only after exhausting more limited remedies did the district court set a 29% nonwhite membership goal based on the percentage of nonwhites in the relevant labor pool. There is nothing in *Sheet Metal Workers* that conflicts with the Eleventh Circuit's decision here.

Finally, *Weber* was a Title VII case involving a training program for entry level jobs in a private plant in Louisiana. The approval of a goal for admission to a training program for unskilled laborers in a private-sector Louisiana plant can hardly dictate the result of the Constitutional analysis of a hard 50% quota for promotions of Fire Lieutenants by the City of Birmingham. Moreover, some have suggested that *Weber* may be due to be reconsidered and overruled. *Johnson*, 480 U.S. 657 (White, J.) and 670 (Rehnquist, Ch.J., and Scalia, J.). Respondents believe the *Weber* analysis has been abused and is not limited to remedying manifest imbalances

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> This, however, is not a case like *Paradise*, where the district court ordered a remedy to combat on egregious refusal to follow its prior orders to end discriminatory practices. This is a case where, to end pending litigation, the City voluntarily entered into a consent decree containing a quota-based affirmative action plan that cannot withstand scrutiny.

App. 39a.

[14] Petitioners fail to point out that the portions of the *Sheet Metal Workers* opinion they rely upon (Parts IV and V of Justice Brennan's opinion and a portion of Justice Powell's separate opinion) failed to command a majority of the Court.

in traditionally segregated job categories but has been a vehicle for racial- and gender-balancing by public and private employers interested in social goals of diversity. *Id.* If review is granted, *Weber* should be reconsidered and overruled.

The notion that *Paradise, Sheet Metal Workers* or *Weber* should dictate the result in this case is wrong. The Eleventh Circuit carefully considered the various factors identified in those cases, as well as *Johnson, Wygant* and *Croson,* in evaluating the City's conduct and determined that the City's actions violated Title VII and the Constitution. The fact that the Eleventh Circuit reached a different result when it evaluated the unique facts of this case does not mean that its decision conflicts with this Court's precedents.

C. The Eleventh Circuit's Decision Is Not In Conflict With Other Circuits.

The City of Birmingham's argument that the decision of the Eleventh Circuit is in conflict with recent decisions of the Fifth and Sixth Circuits is also meritless. City Pet. 14.

The City claims that the court in *Aikens v. City of Memphis*, 37 F.3d 1155 (6th Cir. 1994), "upheld a provision of a decree which actually mandated that, without regard to the percentages of blacks at the entry level positions, the Memphis fire department must reserve at least twenty percent of the annual promotions for blacks. . ." City Pet. 15. That is not accurate. First, the court carefully determined that during the relevant period when promotions to police sergeant were made, 32.4% of the persons in the lower rank were black; during the period when fire lieutenant promotions were made, 15.3% of the persons in the lower rank were black; during the period when promotions to fire investigator were made, 34.3% of the persons in the lower classification were black; and, during the period when fire battalion commander promotions were made, blacks constituted 20% of the persons in the lower ranks.

Under such circumstances, one can hardly dispute a 20% annual goal, assuming all other provisions of a valid plan are in place. Second, the Sixth Circuit found that there were unresolved issues of fact underlying the question of whether the goals of the Decree were narrowly tailored. The court reversed the grant of summary judgment for the defendant City and remanded for full trial of the plaintiffs' claims of unlawful reverse discrimination. The appeals court was concerned about the use of civilian labor force statistics as a long term goal for a promotional position requiring special skills: "there indeed is a possibility that the racial composition of the qualified labor pools for these positions will materially differ from that of the general Shelby County labor force." The Sixth Circuit's decision is not inconsistent with the Eleventh Circuit's evaluation of Birmingham's race-based conduct.

There is also no inconsistency here with the decision of the Fifth Circuit in *Edwards v. City of Houston*, 37 F.3d 1097 (5th Cir. 1994). That court evaluated a proposed consent decree under the standards of *Johnson* and *Croson* and found that it passed muster under both Title VII and the Equal Protection Clause. Unlike the situation in this case, the relief in *Edwards* was carefully crafted to the extent of proven discrimination in promotions to the particular job involved, was clearly linked to the relevant qualified labor pool, was limited in duration, and required the prompt institution of valid bias-free selection procedures. Moreover, the employer created additional positions, at its expense, to assist in the implementation of the remedial plan by eliminating any loss of expected promotions for nonminority employees. The Eleventh Circuit made contrary findings on each of those factors. There is no conflict in the law of the circuits to warrant review by this Court.

II. The Eleventh Circuit Correctly Found The City's Affirmative Action Plan Was Overbroad In Violation Of *Croson*.

Under the various decisions of this Court addressing remedial affirmative action, there are a number of factors to be evaluated in determining whether a plan is narrowly tailored. Using any of the factors identified in *Bakke*, *Wygant*, *Paradise* or *Croson*, it is clear that the Eleventh Circuit's ruling that this plan is not narrowly tailored is due to be upheld. Here, the Eleventh Circuit correctly recognized that the 50% quota was arbitrarily chosen and bore no relationship to the representation of blacks in the pool of persons arguably qualified to be promoted to Fire Lieutenant.

"Under strict scrutiny the means chosen to accommodate the State's asserted purpose must be specifically and narrowly framed to accomplish that purpose." *Wygant*, 476 U.S. at 280; *Fullilove v. Klutznik*, 448 U.S. 448, 480 (1980). The classification should fit "with greater precision than any available alternative." *Wygant*, at 280 n.7. Courts should ". . . give particularly intense scrutiny to whether a nonracial approach or a more narrowly tailored racial classification could promote the substantial interest about as well . . . ." *Wygant*, at 280 n.6.

The Eleventh Circuit found that no effort was made to develop a nonracial remedy or even a less-intrusive racial plan. App. 44a-46a. The *Croson* Court noted the failure of the Richmond City Council to consider race-neutral means to increase minority participation. Recognizing that the alleged barriers to blacks were race-neutral, this Court suggested that ending such barriers would lead to increased minority participation in contracts. 488 U.S. 507. Rather than eliminate barriers, the City of Birmingham opted for the

administratively simple tool of across-the-board racial quotas for all City job classifications.[15]

The Eleventh Circuit recognized and the City freely admitted that it never considered any alternative remedies. App. 47a; 1991-PX-1, response 6. Nor did the City look beyond the goal of racial balancing based on black representation in the local population. "It rests upon the 'completely unrealistic assumption' that minorities will choose a particular trade in lockstep proportion to their representation in the local population." *Croson*, at 507. The City Decree was adopted in summary fashion with no consideration given to the individual components of the plan and the extent of their necessity in the various departments and levels of City government. App. 6a-9a. There were no realistic efforts to identify or redress whatever discrimination existed in the BFRS promotional process or the Engineering Department's promotional process.

The Eleventh Circuit correctly recognized that less intrusive remedies were available. These include elimination of points for seniority or implementation of new testing procedures. App. 46a-47a. The City gave no consideration to such alternatives. Race-neutral relief is realistic and should be the rule rather than the exception. If the elimination of any barriers to the promotional opportunities of blacks does not remedy a perceived violation, then an employer might consider stronger measures. Other less intrusive remedies could have

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[15] The recent decision of the Eleventh Circuit in the parallel modification proceedings makes clear that the day has come for Birmingham and the Personnel board to stop making administratively-convenient race-based employment decisions and move to implement fair and nondiscriminatory selection procedures with all deliberate speed. *See, Ensley Branch v. Seibels*, 31 F.3d 1548 (11th Cir. 1994).

included wide-band certifications,[16] referral goals, or other devices designed to increase the numbers of certified blacks. At that point Birmingham still could have selected in a non-discriminatory manner. Other recognized but less intrusive remedies than rigid quotas would include double filling[17] or, if all other less intrusive remedies failed, promotion goals for identified victims of past discrimination based on representation among fire fighters qualified for promotion or applicant flow. App. 47a. Under no circumstances, however, were the defendants justified in adopting a program where race was the only relevant criteria for promotional decisions and half of the jobs were set aside for blacks.

Second, the *Croson* Court wrote, "the 30% quota cannot be said to be narrowly tailored to any goal, except perhaps outright racial balancing." Thirty percent was a number arbitrarily chosen by the City of Richmond as a pure set aside. The Eleventh Circuit found that Birmingham's 50% set aside is not tied to any realistic goal.[18] App. 51a-52a. Half of the

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[16] The wide band certifications in *Paradise II* were recognized by the Eleventh Circuit as merit-based and fair to all applicants, regardless of race. *Paradise v. Prescott*, 767 F.2d 1514, 1537-1538 (11th Cir. 1985). *See also Bridgeport Guardians v. City of Bridgeport*, 933 F.2d 1140 (2d Cir. 1991) ("the banding remedy ordered by the district court provides some relief to other disadvantaged minority candidates by increasing at least the possibility that some of them will receive promotions").

[17] *See Youngblood v. Dalzell*, 804 F.2d 360, 363 (6th Cir. 1986).

[18] The City has acknowledged that the 50% set aside was not based on any appropriate criteria. See 1991-PX-1, Response 3. In earlier briefs in this litigation, Birmingham claimed the 50% quota was permissible because a 50% ratio was approved by this Court for the training program at issue in *Weber*. See, Eleventh Circuit case no. 86-7108, brief of defendant-intervenors Martin, et al. at 24; adopted by reference in City brief at 26, n.24. Such a position is without merit. The *Croson* Court rejected the notion that "findings" of discrimination or past societal discrimination can be shared from jurisdiction to jurisdiction. See, 488 U.S. 505. The approval in

(Footnote continued)

promotions were allocated to blacks at time when blacks represented between nine and thirteen percent of the relevant labor pool.[19] App. 53a. The Eleventh Circuit correctly determined that such a set aside is not designed to ensure against discrimination in making promotions but, like the program in *Croson*, is a program of outright racial balancing. App. 53a.

There is no dispute that the City implemented its quota program in a strict and unyielding manner. The City ignored the provisions of paragraph 2 of the Decree that allowed flexibility in its implementation. If blacks were certified, they were almost always promoted. Indeed, the district court interpreted the Decree as "requiring" a set aside of half the jobs for blacks. App. 79a-80a. Incredibly, at one point the City promoted seven blacks deemed "not qualified" by its own review board over available whites deemed qualified. 1991-PX-7 (pp. 165-71). Similarly, when the City exhausted the supply of available blacks from the 1982 and 1983 Fire Lieutenant registers, it stopped promoting anyone until a new register became available rather than promote white candidates. It is

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Weber of a 50% quota for a private sector training program at a plant in Louisiana hardly can serve to justify a 50% promotional set aside in the BFRS.

[19] *Compare, Stuart v. Roche*, 951 F.2d 446, 451 and 454 (1st Cir. 1991) (Breyer, Ch.J.) ("The Decree compares the number of black sergeants, not with the Boston population in general, but with those police officers with the minimum qualifications needed to become sergeants. Given the level of skill and training necessary to be a fire officer and the fact that all fire officers are drawn from the pool of incumbent fire fighters, it is undisputed that blacks represented some 9 to 13% of the relevant qualified labor pool. Reliance on the relevant labor pool is necessary in determining both the scope of the injury and the extent of the remedy necessary. "*Hazelwood [School District v. United States*, 433 U.S. 299 (1977)] demonstrates this Court's focus on prior discrimination as the justification for, and the limitation on, a State's adoption of race-based remedies." *Wygant*, 476 U.S. at 275.

undisputed that the City never considered qualifications of promotional candidates and promoted strictly on the basis of race. 1985-PX-31, 36; R5-276. The City used no job-related selection procedures and made no effort to implement such procedures. R5-276.

Birmingham did not narrowly tailor the Decree to the evidence produced at the earlier trials in the litigation. It aggressively implemented race-based programs that were consistent with its political agenda and significantly reduced its financial exposure. The Eleventh Circuit correctly found that the City plan is not narrowly tailored in the manner required by the Constitution.

III. The City Has Unlawfully Trammeled The Interests Of Plaintiffs In Violation Of Title VII.

The Eleventh Circuit also found that the City Decree, as implemented, unnecessarily trammeled respondents' interests in violation of Title VII. *See, Johnson*, 480 U.S. at 630. When the City injected race into the promotional process, it took on a corresponding duty to use race carefully and to the least extent necessary to achieve a remedial purpose. Rather than carefully tailor its program to ensure that nonminority expectations of promotion were not unreasonably curtailed, the City attacked the problem with the sledgehammer of a 50% quota. While the *Johnson* annual goal of 6% was considered realistic in view of the relevant qualified labor pool for the job at issue, the 50% annual goal here clearly is overbroad when one considers that blacks represented between 9 and 13% of the persons in the fire fighter classification during the years plaintiffs were denied promotions. The 50% quota was not tied to anything except outright racial balancing. App. 38a. The district court's Opinion identified no justification for such a goal. App. 71a, 81a.

In *Johnson*, this Court found the 6% interim annual promotional goal a realistic approach, based on the number of women in the qualified labor market, when women held none of the 238 positions in the relevant job classification. Perhaps more important, though, was the *Johnson* goal's reliance on individual qualifications as the paramount factor in evaluating candidates for promotion. No job was set aside for anyone. As in the Harvard plan approved by Justice Powell in *Bakke*, all candidates in Santa Clara program were carefully considered on the basis of their individual qualifications and no position was reserved on the basis of race or sex. While gender was a single "plus" factor in the evaluation process, qualifications controlled the final decision. On the other hand, this Court made clear that a plan which did not allow for the evaluation of relative qualifications and was based solely on achievement of numerical goals would not pass muster:

> By contrast, had the Plan simply calculated imbalances in all categories according to the proportion of women in the area labor pool, and then directed that hiring be governed solely by those figures, its validity fairly could be called into question. This is because analysis of a more specialized labor pool normally is necessary in determining underrepresentation in some positions. If a plan failed to take distinctions in qualifications into account in providing guidance for actual employment decisions, it would dictate mere blind hiring by the numbers . . . .

480 U.S. at 636. As the City freely admitted, the relative qualifications of competing black and white employees in the BFRS promotional process were not considered. App. 18a. The City engaged in the sort of "blind hiring by the numbers" condemned in *Johnson*. The BFRS Chiefs acknowledged their firm obligation to meet the 50% set aside so long as the Board certified blacks. *Id.* The only factors considered in appointing

the black candidates were the fact of certification and race.[20] Such an inflexible program of set asides unnecessarily trammels the interests of nonminorities by completely shutting them out from half of the available jobs. In the promotional context, where the burden is not diffused over society generally, such trammeling is intolerable.

The Eleventh Circuit correctly found that the loss of a promotion is a serious injury warranting relief. App. 35a. First, the notion raised by the Martin petitioners that the burden on the respondents was slight is both offensive and wrong. Martin Pet. 17. Loss of a pay increase for working class families is a serious injury. Moreover, while some nonminorities received their promotions in a timely manner, others were denied promotion year after year, and others finally retired in frustration having never received their promotions.[21] The full impact of the promotional remedy fell on a small group of nonminority firefighters seeking promotion. The finding that the plan unnecessarily trammeled the interests of those individuals should be upheld. App. 34a-35a.

Defendants cannot contest the fact that they engaged in the sort of "blind hiring" by the numbers condemned in *Johnson*.

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[20] In upholding the plan in *Johnson*, Justice O'Connor noted that the employer "knew far more than merely the sex of the candidates and that they appeared on a list of candidates eligible for the job." 480 U.S. at 655-656. On the contrary, Justice O'Connor wrote, "an affirmative action program that automatically and blindly promotes those marginally qualified candidates falling within a preferred race or gender category, or that can be equated with a permanent plan of 'proportionate representation by race and sex,' would violate Title VII . . ." *Id.* The Eleventh Circuit correctly found this case presents exactly that sort of program.

[21] For example, respondent Chambers was denied a promotion in 1982 and never promoted prior to his recent retirement. Respondent Wilks was denied promotion for three successive years until he was finally promoted. Respondent Ware was never promoted to Civil Engineer.

Here, the district court and the persons responsible for implementing the program in the BFRS described the process as a set aside of 50% of the promotional positions for blacks. R1-110-8 and 10; 85-PX-31 (p. 217); 85 PX-36 (pp. 136-137, 175, 650); 85-DX-2235 (pp. 173, 176, 186). There was no careful investigation of qualifications. 85-PX-400 (pp. 422-426, 526, 527). There was no diffusing of the burden over a large group of individuals, no process to review the manner in which the program was implemented and no clearly defined annual period to assess progress. 85-PX-400 (pp. 468-470). There was no clearly defined time at which the program would end. 85-PX-400 (p.459). There was no less intrusive goal based on applicant flow, the relevant labor market or whether the preferred candidates were individual victims of past discrimination. While the City has claimed the Decree contains a "flexible waiver" provision in paragraph 2, it has acknowledged that it has ignored this provision. None of the plaintiffs had their individual qualifications considered or evaluated. Half the jobs were reserved for certified blacks. R1-110-10. Such a plan is clearly excessive and not worthy of further review by this Court.

Conclusion

For the foregoing reasons, the petitions for writ of certiorari should be denied.

March 23, 1995.

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IN THE
Supreme Court of the United States
October Term, 1994

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Petitioners,

v.

ROBERT K. WILKS, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITIONERS' REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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Respondents' opposition ("Opp.") to the petition for *certiorari* ("Pet.") is far more notable for what it omits than for what it says. Respondents utterly fail to discuss several of the questions presented in the petition, implicitly conceding that this Court should grant *certiorari* to review at least the following questions:

- Whether reverse discrimination plaintiffs may rely on invalid tests (and other biased job selection criteria) to demonstrate their entitlement to at-issue jobs?
- Whether the *achievement,* but not the maintenance, of a racially balanced workforce is unconstitutional as a remedy for egregious discrimination by an employer?

- Whether the Constitution and Title VII require slow, prolonged relief instead of swift relief of shorter duration?
- Whether the rights of nonminorities are unduly trammeled if, to remedy decades of blatant employment discrimination, the employer adopts affirmative action measures that have the effect of delaying the promotions of nonminorities by an average of 7-9 months over what would have happened *had the discriminatory scheme been perpetuated*?

The Eleventh Circuit answered each of these questions in the affirmative; respondents do not dispute that this Court, like most of the courts of appeal, has previously answered each in the negative.

The principal argument advanced by respondents is that the Eleventh Circuit's decision in this case is justified by respondents' interpretation of this Court's opinion in *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989), a "landmark decision" that implicitly overturned the prior several decades of this Court's affirmative action jurisprudence directly relating to employment discrimination.[1] Such an interpretation of *Croson*, if justified—which it is not—would suggest that this Court should grant *certiorari*, not deny it, in order to consider the conflict between *Croson*, as extended, and the other decisions of this Court.

Indeed, quite apart from the resulting injustice in the instant case, if left standing the decision below would exacerbate the confusion that exists in the public at large and in the halls of Congress as to the legitimate role and bounds of affirmative

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[1] Heretofore, respondents' principal *Croson*-based argument was that the Decree is invalid because the City failed to make particularized findings of fact prior to negotiating and entering into the Decree. The district court and the Eleventh Circuit explicitly rejected that argument. *Bennett v. Arrington*, 806 F. Supp. 926, 928 (N.D. Ala. 1992), *rev'd sub nom In re Birmingham Reverse Discrimination Empl. Litig.*, 20 F.3d 1525 (11th Cir. 1994) ("BRDEL Appeal II"); BRDEL Appeal II, 20 F.3d at 1539.

action. That role and those bounds present pressing issues of constitutional importance, and this Court should grant *certiorari* to make clear that the Eleventh Circuit was wrong, that *Croson* is not the impediment claimed by respondents, and to reiterate that appropriately defined affirmative action is constitutional.

We first discuss *Croson*, then the fundamental flaw in respondents' position, and finally a number of miscellaneous assertions raised by respondents.

I. CROSON DOES NOT JUSTIFY THE ELEVENTH CIRCUIT'S DECISION.

Croson, like various other decisions of this Court, requires that voluntary affirmative action undertaken by a public entity be justified by a compelling governmental interest and be narrowly tailored to fit the demonstrated need for such action. *Croson* principally concerns the first requirement—compelling governmental interest—and in that regard reemphasizes this Court's decision in *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 307-09 (1978), that an "amorphous" recital of the existence of "societal discrimination" does not establish a compelling interest justifying remedial measures. Unlike *Croson*, both the district court and the Eleventh Circuit held that the City of Birmingham had a compelling interest to justify race-conscious affirmative action.[2] That interest was not based on a claim of amorphous societal discrimination, but rather on evidence of the City's own past employment discrimination against blacks, which, as the district court found when it entered the Decree, made it likely that the City and Board "would in time be held liable for discrimination against blacks". *United States v. Jefferson County*, 28 Fair Empl. Prac. Cas. (BNA) 1834, 1838 (N.D. Ala. 1981), *aff'd*, 720 F.2d 1511 (11th Cir. 1983). Thus, as both lower courts have agreed, the Decree is not

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[2] Although respondents "continue to maintain . . . that the City lacked a compelling governmental interest", Opp. at 14 n.10, their continued protest is irrelevant: no party has sought review of the Eleventh Circuit's conclusion that the City indeed possessed a compelling governmental interest in redressing past discrimination.

subject to the same "compelling interest" problems as Richmond's plan in *Croson.*

Croson is of little help in evaluating the "narrow tailoring" requirement because it does not directly address that prong of strict scrutiny: "[I]t is almost impossible to assess whether the Richmond plan is narrowly tailored to remedy prior discrimination since it is not linked to identified discrimination in any way. We limit ourselves to two observations in this regard." *Croson*, 488 U.S. at 507. Neither "observation" justifies the Eleventh Circuit's decision or warrants the denial of *certiorari* in this case.

This Court observed that Richmond did not first consider *any* race neutral means to increase minority participation in city contracting. Although respondents claim "the City freely admits that it never considered alternative remedies", Opp. at 24,[3] in fact, both before the negotiations to settle the discrimination litigation and during those negotiations, the City considered, attempted and sought to negotiate for a variety of alternatives.[4] Suggesting that Richmond, a city apparently lacking any evidence of its own racial discrimination in letting contracts, should have considered race-neutral means is a far cry from

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[3] The evidence on which respondents rely for their assertion, 1991 PX 1 (Response of Arrington and the City of Birmingham to Plaintiffs' Interrogatories and Request for Production) Response 6, actually states: "'Alternatives' considered or proposed by counsel for the City previously had been rejected by the Justice Department."

[4] *See* Petition for Writ of Certiorari ("Pet.") at 26-27. The district court explicitly found that the City had considered and attempted a variety of affirmative action mechanisms before negotiating the consent decrees, all of which had been largely unsuccessful. *Bennett v. Arrington*, 806 F. Supp. 926, 929-30 (N.D. Ala. 1992). The Eleventh Circuit's conclusion, relied on by respondents, that entry-level hiring had improved as a result of the injunctive relief ordered by the district court following the 1977 trial, *see* Opp. at 15; Pet. at 28, not only ignores the fact that despite the 1977 order, at the time of the Decree's entry, *no* blacks held any promotional position in the BFRS, 1991 PX 11 at 51, but also depends upon the untenable proposition that a promotional remedy may never exceed race neutrality. *See* Pet. at 11-13.

invalidating Birmingham's effort to settle meritorious litigation brought against it by the United States and private plaintiffs, especially when the City considered and attempted alternatives. See Pet. at 27.

Second, *Croson* observed that Richmond's 30% MBE set-aside was based on the "'completely unrealistic' assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population." 488 U.S. at 507 (quoting *Local 28 of Sheet Metal Workers Int'l, Assoc. v. EEOC*, 478 U.S. 421, 494 (O'Connor, J., concurring and dissenting) (1986). That assumption was not made here: the *uncontested* record evidence established that the relevant labor pool for blacks in fire department jobs was *greater* than their representation in the civilian labor force. 1991 Tr. 152-53, 156-57.[5] Furthermore, as the district court found, the long-term goals were "largely hortatory", *United States v. Jefferson County*, No. CV 75-P-666-S (N.D. Ala. entered May 21, 1991) reprinted in the Appendix to the Martin intervenors' Petition for Certiorari at A166, A177; *aff'd sub nom Ensley Branch, NAACP v. Siebels*, 31 F.3d 1548 (11th Cir. 1994); as discussed at length in our petition, no consequence attended the failure to meet any Decree goals. Pet. at 17-25.

II. RESPONDENTS' OPPOSITION, LIKE THE ELEVENTH CIRCUIT'S DECISION, IS FUNDAMENTALLY FLAWED.

The linchpin of the Eleventh Circuit's decision is its assumption that respondents were, because of their race, denied promotions *to which they were entitled*. The *only* basis on which respondents claim to be entitled to the particular promotions they did not get is that their combination of test score and seniority points was greater than that of some blacks who were

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[5] Like the Eleventh Circuit, respondents suggest that the relevant labor pool for Fire Lieutenant was the tainted pool of Firefighters, which was 9-13% black at the time the Decree was entered, and that any goals in excess of that proportion are unconstitutional. Opp. at 26 n.19. Respondents offer no response to our explanation that the Eleventh Circuit's holding on this issue conflicts with this Court's decisions. *See* Pet. at 12-13.

promoted. Thus, respondents claim that the City "had to jump over some 80 qualified whites in order to certify and promote some black employees." Opp. at 7 n.6. Both the promotional tests and the use of seniority points, however, had serious adverse impact against blacks and were not job-related. Indeed, at the 1985 trial, respondents advanced a number of criteria in an attempt to prove their superior qualifications; the district court rejected each of those. *In re Birmingham Reverse Empl. Discrimination Litig.*, 39 Fair Empl. Prac. Cases (BNA) 1431, 1444 ¶ 97, *rev'd*, 833 F.2d 1492 (11th Cir. 1987), *aff'd sub nom Martin v. Wilks*, 490 U.S. 755 (1989); *see generally* Pet. 15-17.

By reversing the district court and deeming respondents' reverse discrimination claims meritorious, the Eleventh Circuit has held that respondents have been injured merely because the prior discriminatory system was not left in place, and that any effort to dismantle that discriminatory system constitutes reverse discrimination. That holding cannot be squared with any of this Court's affirmative action jurisprudence, which firmly establishes that "innocent persons may be called upon to bear some of the burden of the remedy" for past discrimination. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 281 (1986).[6] As the Seventh Circuit has held (in a case relied upon by respondents):

> If on remand the promotion of the two black lieutenants out of rank order does not survive strict scrutiny, it does not follow that the Billish plaintiffs will win. They have no vested rights in their position on an eligibility list compiled on the basis of an examination that may have been biased in favor of whites.

Billish v. City of Chicago, 989 F.2d 890, 895 (7th Cir. 1993) (en banc); *see also Edwards v. City of Houston*, 37 F.3d 1097, 1115 (5th Cir. 1994) (*reh'g en banc. granted*) (nonminorities "do not have a vested interest in continuing to receive the benefits of

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[6] For this same reason, *Wygant* disposes of respondents' argument that promotional relief can be no greater than a goal equal to the percentage of minorities in a feeder position.

past discrimination"). Without the assumption—wholly rejected by the record evidence and the district court's findings of fact—that respondents were better qualified for the at-issue promotions than petitioners, the Eleventh Circuit's decision collapses, for there is no evidence that respondents' rights have been trammelled *at all*.

III. RESPONDENTS' ATTEMPTS TO DEFEND THE ELEVENTH CIRCUIT'S DECISION ARE FUTILE.

Lawfulness of 50% annual goals: Like the Eleventh Circuit, respondents attempt to distinguish *Paradise* by noting that it concerned court-ordered affirmative action, not a voluntary plan. However, that distinction is irrelevant to the proposition, clearly recognized in *Paradise*, that a short-term goal need not itself be pegged to the relevant labor pool for minorities, but may be fixed at a number in excess of the pool. The Court's holding, which is equally true whether the plan in question is voluntary or court-ordered, is that "the 50% figure is not itself the goal; rather it represents the speed at which the goal of 25% will be achieved." *United States v. Paradise*, 480 U.S. 149, 179 (1987). Furthermore, pursuant to the modifications made by the district court in 1991, *U.S. v. Jefferson County*, No. CV 75-P-666-S (May 21, 1991), all percentage goals terminate as soon as nondiscriminatory selection procedures are put into place—just as in *United States v. Paradise*. 480 U.S. 149, 178 (1987).[7]

Contrary to respondents' assertion, petitioners do not rely on *United Steelworkers of Am. v. Weber*, 443 U.S. 267 (1986), for the proposition that evidence of discrimination "can be shared from jurisdiction to jurisdiction", Opp. at 25 n.18, but for

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[7] Respondents offer no rebuttal whatsoever to the actual promotional practices under the Decree, which demonstrate that all Decree goals, including the 50% annual promotional goal for Fire Lieutenant, were not implemented in a wooden or inflexible manner. *See* Pet. at 23-25. Likewise, respondents do not dispute that the Decree itself contains a variety of provisions assuring its flexibility. *See* Pet. at 22-23.

the proposition established in *Weber* and reiterated in *Paradise*: a percentage annual goal is a permissible means to accelerate affirmative action, even when that goal is in some sense "arbitrary" and higher than the percentage of minorities in the relevant labor pool. Thus, respondents cannot rely on *Croson*'s disapproval of a fixed 30% MBE set-aside goal to support the Eleventh Circuit's decision: the 30% goal was not an annual goal designed to accelerate relief, but was the equivalent of the long-term goals here, which, unlike the 30% set-aside in *Croson*, were set at *less than* the relevant labor pool for black fire department employees. *See* Pet. at 14 n.11.[8]

Achievement of a Racially Balanced Workforce: Respondents, like the Eleventh Circuit, harp on the 50% goals (but not the 28% long-term goals) as "outright racial balancing". *See* Opp. at 25-26. This Court has clearly upheld, as a way to redress past discrimination by an employer, goals providing for the achievement (but not the maintenance) of a racially balanced workforce, taking into account relevant labor pools. *Paradise*, 480 U.S. at 179; *Johnson v. Transportation Agency*, 480 U.S. 616, 635 (1987); *Weber*, 443 U.S. at 208. The 30% MBE set-aside in *Croson* could be characterized as "outright racial balancing" because there was no evidence that, absent discrimination by Richmond, minorities would have chosen the construction profession "in lockstep proportion to their representation in the local population". 488 U.S. at 507. Here, however, the 28% long-term goals are concededly based on relevant labor pools and, unlike the 30% goal in *Croson*,

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[8] Respondents also attempt to distinguish the 50% short-term goal approved by this Court in *Weber* by noting that *Weber* was a Title VII case (not an equal protection case) and perhaps should be overruled. Opp. at 20. If private employers facing only a "manifest imbalance" in their workforce are able to take greater remedial action than public employers faced with a compelling governmental interest resulting from their own prior employment discrimination, or if *Weber* is to be overruled, this Court, not the Eleventh Circuit, must make that decision.

terminated upon achievement—which happened in 1989 (for Fire Lieutenant) and 1991 (for Fire Captain).

Unnecessary Trammelling of Nonminorities: Apart from conclusory allegations that the burden was "not diffused" and that a delay in promotion "is a serious injury", Opp. at 29, respondents simply refuse to confront the actual effect of the Decree on nonminorities. As a result of the "sledgehammer" 50% Fire Lieutenant goal, the promotions of nonminorities were "delayed", on average, approximately seven months *when compared to what would have happened had discrimination against blacks been perpetuated. See* Pet. at 19-21.[9] This Court has never held that slight "delays" in promotion violate the Constitution. To so hold would invalidate all affirmative action, leaving the prohibition of future discrimination as the greatest

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[9] As respondents suggest, Opp. at 29 & n.21, their individual cases are indeed illustrative. The basis of respondents Payne and Click's claims is a promotional "delay" of 19 weeks; Morgan complains of a "delay" of 27 weeks; and Pope of 13 weeks. 1991 Ex. 2. In Chambers' case, the fault lies not with the Decree, but with his stars or himself (depending on one's view of test validity within a racial group). In 1982, Chambers finished 11th in combined seniority and test score, just barely enough to be promoted in rank order. 1991 Ex. 1 (Of course, his "entitlement" is based on the erroneous assumption that the test and points were nondiscriminatory.) He retook the test in March, 1983 and October, 1984, but never again scored high enough to be promoted *even if no blacks had ever again been promoted*, and even though the tests and seniority points continued to discriminate in his favor. 1991 Ex. 1, 2. Between 1982 and 1988, 30 white males were promoted instead of Chambers, 1991 Ex. 1, 2, who has still not been promoted despite the goal's expiration six years ago.

relief one could obtain for egregious past discrimination. This is just the effect of the decision below and reason enough for the writ of certiorari to issue.

CONCLUSION

The Eleventh Circuit's decision fundamentally undermines decades of this Court's affirmative action jurisprudence, jeopardizes the rights of victims of discrimination to obtain speedy redress of their rights, and threatens employers with liability if they choose to settle legitimate race discrimination claims brought against them. For the reasons set forth in the petition and in this reply, petitioners John W. Martin, *et al.*, respectfully urge this Court to grant a writ of *certiorari* to review the above-captioned matter.

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